

N. 3013

No. 15221

United States
Court of Appeals
for the Ninth Circuit

JOHN FARLEY, Appellant,
vs.

UNITED STATES OF AMERICA, Appellee.

UNITED STATES OF AMERICA, Appellant,
vs.

JOHN FARLEY, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 328, inclusive)

Appeals from the United States District Court for the
District of Oregon

FILED

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PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the
District of Oregon

Civil No. 7435

JOHN FARLEY,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

LIBEL IN PERSONAM

To the Honorable James A. Fee, Claude McCulloch
and Gus J. Solomon, Judges of the District
Court of the United States, for the District of
Oregon.

In Admiralty Sitting:

The libel of John Farley against the United
States of America, as represented by the United
States Maritime Administration, successors to the
United States Maritime Commission, successors to
the National Shipping Authority, in a cause for
damages and maintenance and cure resulting from
the negligence of Respondent, and the unseaworth-
iness of that certain merchant vessel "SS Augustin
Daly," respectfully shows as follows:

Action Under Special Rule for Seamen to Sue
with Security and Prepayment of Fees 28
USCA Sec. 1916

I.

That at all times hereinafter mentioned, the Re-
spondent, The United States of America, as repre-

sented by the United States Maritime Administration, successors to the United States Maritime Commission, successors to the National Shipping Authority, was engaged generally in the operation of merchant vessels, and among said merchant vessels which said Respondent owned, operated, controlled and managed, under what is commonly known as a "general agency agreement" with W. R. Chamberlin & Company, a corporation, general agent, was a vessel known as the SS Augustin Daly.

II.

That heretofore, on or about the 25th day of March, 1954, Libelant made and presented a claim as herein alleged to the United States of America, Respondent, and to the general agent, W. R. Chamberlin & Company, and that said claim has been neither accepted nor rejected to this date, and the same is deemed administratively disallowed.

III.

That on or about February 24, 1952, the Libelant signed articles aboard the SS Augustin Daly, and on said date was employed by the Respondent in the position of Second Assistant Engineer aboard said vessel; that thereafter and on or about April 5, 1952, at the approximate hour of 1 o'clock a.m., when said vessel was anchored in the harbor at the Port of Sasebo, Japan, the Libelant, while in the course of his employment, was returning to said vessel from authorized shore leave, and at said time was standing in a launch alongside of the ves-

sel while other members of the crew then and there returning to the vessel were ascending a pilot or "Jacob's" ladder which was then and there provided as the only means of ingress to said vessel; that at said time and place, due to the carelessness and negligence of the Respondent and the unseaworthiness of the vessel as hereinafter alleged, the Libellant sustained severe and grievous injuries as hereinafter alleged, when another member of the crew of said vessel was suddenly and violently precipitated from said Jacobs ladder over and against Libellant.

IV.

That Respondent was then and there reckless, careless and negligent in the following particulars:

(a) In maintaining a pilot or "Jacobs" ladder as the only means of ingress to said vessel under the circumstances then and there existing, when Respondent knew, or in the exercise of ordinary care should have known, that such action created a serious and imminent danger to crew members attempting to board said vessel, and particularly to Libellant herein.

(b) In failing to have in use an accommodation ladder, or other companionway type of gangway, to provide a safe means of ingress to said vessel under the circumstances then and there existing, when the Respondent knew, or in the exercise of ordinary care should have known, that such action created a serious and imminent danger to crew members attempting to board said vessel, and particularly to Libellant herein.

(c) In failing to provide adequate, or any, lighting on or near said Jacob's ladder under the circumstances then and there existing, when Respondent knew, or in the exercise of reasonable care should have known, that such failure created a serious and imminent danger to crew members attempting to ascend said ladder, and particularly to the Libellant herein.

(d) In failing to provide Libellant with a safe and seaworthy place in which to work, as aforesaid.

V.

That said vessel was unseaworthy in that it was not equipped with safe, proper and seaworthy appliances appurtenant thereto, in that said vessel was not then and there rigged with a properly lighted companionway type of gangway so as to afford a safe means of ingress to said vessel.

VI.

That as a direct and proximate result of the unseaworthiness of the said vessel, and the negligence of the United States of America as aforesaid, Libellant sustained a fracture of the right clavicle and compression fractures of several vertebrae in the dorsal spine, and a severe wrenching, twisting and tearing of the muscles, ligaments, tendons, nerves and soft tissues of his shoulder and of his upper and lower back, and an acute traumatic arthritis of the dorsal spine, and an aggravation of a pre-existing osteo-arthritis of the dorsal and lumbar spine, which was previously causing Libellant no pain or difficulty, all of which has caused Libellant

to suffer severe pain and distress, and has required that he provide himself with a brace to support his back, and that all of said injuries are permanent, and all to Libelant's damage in the amount of Ninety-Six Thousand Two Hundred Fifty-Seven (\$96,257.00) Dollars.

VII.

That prior to said injuries, Libelant was a healthy, robust and able-bodied man, of the age of fifty-eight (58) years, with a life expectancy of approximately 16.32 years, earning the approximate sum of Seven Hundred (\$700.00) Dollars per month, exclusive of room and board.

VIII.

That by reason of said injuries, Libelant has lost money wages in the approximate amount of Thirteen Thousand Seven Hundred Forty-Three (\$13,743.00) Dollars, which he claims as special damages, and will lose further wages.

IX.

That Libelant is entitled to maintenance and cure at the rate of Eight (\$8.00) Dollars per day for a period of three hundred sixty-five (365) days from July 23, 1953.

X.

That all and singular the terms are true, and within the admiralty and maritime jurisdiction of the United States of America, and of this Honorable Court; that the residence of Libelant herein is in the County of Washington, State of Oregon, and

said residence address is P. O. Box No. 15, Aloha, Oregon.

Wherefore, Libelant prays that citation in due form, according to the course and practice of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against Respondent; that it may be required to appear and answer on all the matters aforesaid, and that this Honorable Court may be pleased to decree payment to Libelant of the sum of Thirteen Thousand Seven Hundred Forty-Three (\$13,743.00) Dollars as wages lost to the date of filing this suit, and for any additional wages that Libelant may lose prior to the time of trial hereof, and that Libelant may have the sum of Ninety-Six Thousand Two Hundred Fifty-Seven (\$96,257.00) Dollars as general damages; the sum of Two Thousand Nine Hundred Twenty (\$2,920.00) Dollars for maintenance and cure, and such other and further relief as in law and justice he may be entitled to receive.

WILLIAMS & ALLEY

/s/ By DAVID R. WILLIAMS

Of Proctors for Libelant

Duly Verified.

[Endorsed]: Filed April 2, 1954.

[Title of District Court and Cause.]

EXCEPTIONS

Comes now the respondent and proceeding in accordance with Rule 27 of the Rules of Practice in

Admiralty and Maritime Cases, excepts to the libel filed herein and moves the Court for an order dismissing the above entitled cause on the grounds that this Court does not have jurisdiction to hear and determine this suit and does not have jurisdiction over the person of the respondent or over the subject matter of this suit, and on the further and separate grounds that the libel herein does not state facts sufficient to constitute a cause of suit against the United States for the following reasons:

First: This libel was filed on or about April 2, 1954 against the United States under the Suits in Admiralty Act to recover damages for injuries sustained and to recover maintenance and cure. Paragraph II of said libel alleges that the libelant made and presented a claim to the United States of America, respondent, and to the general agent, W. R. Chamberlin & Company, on the 25th day of March, 1954, and that the claim has been neither accepted nor rejected to the date of the filing of this libel and that the same is deemed administratively disallowed.

Second: That is is necessary for the libelant to file an administrative claim against the United States and said claim must expressly be disallowed or sixty days must expire before the United States is subject to suit by said libelant, all in accordance with the Clarification Act, 57 Stat. 45, 50 U.S.C.A. App. 1291, Subsection (a), as reenacted by the Third Supplemental Appropriation Act of June 2, 1951, 65 Stat. 59, 46 U.S.C.A. 1241 (a), and the applicable regulations of the War Shipping Ad-

ministration, the Maritime Commission, and the Maritime Administration.

Third: That it appears on the face of the libel that it was not filed in compliance with the above statutes and regulations and the respondent United States of America has not otherwise consented to be sued herein.

Wherefore, respondent respectfully prays that the libel herein be dismissed.

/s/ C. E. LUCKEY,
United States Attorney,
/s/ VICTOR E. HARR,
Assistant United States Attorney,
Proctors for Respondent

KRAUSE, EVANS & LINDSAY,
/s/ JACK L. KENNEDY,
Of Counsel to Proctors for
Respondent

Acknowledgment of Service Attached.

[Endorsed]: Filed April 22, 1954.

[Title of District Court and Cause.]

ORDER OVERRULING EXCEPTIONS

This matter came on regularly for hearing on May 3, 1954, upon Respondent's exceptions to libel, and Motion to dismiss the same, and Respondent appearing by Jack L. Kennedy, of counsel to Proctors for Respondent, and Libelant appearing by David R. Williams of Proctors for Libelant, and

memorandum briefs having been submitted, and the Court being advised in the premises;

It Is Therefore Ordered, Adjudged and Decreed that Respondent's exceptions to libel heretofore filed be and the same hereby are overruled, and Respondent's Motion to dismiss the libel herein be and the same hereby is denied.

Dated this 7th day of May, 1954.

/s/ CLAUDE McCOLLOCH,
Judge

[Endorsed]: Filed May 11, 1954.

[Title of District Court and Cause.]

ANSWER

To the Honorable Claude McColloch and Gus J. Solomon, Judges of the United States District Court for the District of Oregon, in Admiralty sitting:

The answer of the respondent, United States of America, to the libel of John Farley, alleges upon information and belief as follows:

I.

Respondent denies each and every allegation in Article I of the libel, except that respondent admits and alleges that at all times mentioned in said libel it owned, operated, controlled and managed a certain merchant vessel known as the SS Augustin Daly, and that W. R. Chamberlin & Company, a corporation, acted as the shoreside husband for said vessel pursuant to an agreement between said corporation and the respondent.

II.

Respondent denies each and every allegation in Article II of the libel, except that respondent admits and alleges that on or about the 25th day of March, 1954, libelant mailed a claim to the United States Maritime Administration and to W. R. Chamberlin & Company, and that said claim had never been accepted or rejected at the time of the filing of said libel.

III.

Respondent denies each and every allegation in Article III of the libel, except that respondent admits and alleges that libelant signed articles aboard the SS Augustin Daly on or about February 25, 1952 and that he was thereafter employed as a second assistant engineer aboard said vessel and that libelant sustained some injuries on or about April 5, 1952 when another member of the crew of said vessel fell upon him.

IV.

Respondent denies each and every allegation contained in Articles IV and V of the libel, and the whole thereof.

V.

Respondent denies each and every allegation in Article VI of the libel, except that respondent admits that libelant sustained some injury, the exact extent thereof being unknown to the respondent.

VI.

Respondent does not have any knowledge or information sufficient to form a belief as to the truth

or falsity of the allegations contained in Articles VII and VIII of the libel and therefore denies the same.

VII.

Respondent denies each and every allegation in Article IX of the libel and the whole thereof.

VIII.

Respondent denies each and every allegation in Article X of the libel, except that respondent admits that libelant resides in the County of Washington and State of Oregon.

Further answering the libel and for a first separate and affirmative defense, respondent alleges on information and belief as follows:

I.

On or about the 25th day of March, 1954, libelant mailed a claim to the United States Maritime Administration and to W. R. Chamberlin & Company and alleged that he sustained certain injuries on or about April 5, 1952 while serving aboard the SS Augustin Daly.

II.

Libelant commenced this suit on or about the 2nd day of April, 1954, and at the time of the filing of this libel said claim had not been accepted or rejected and sixty (60) days had not expired between the filing of said claim and the filing of said libel.

III.

Said claim must expressly be disallowed or sixty (60) days must expire between the filing of said

claim and the filing of said libel before the respondent United States of America can be sued herein, and this Court does not have jurisdiction over the person of the respondent or over the subject matter of this suit and the libel further does not state facts sufficient to constitute a cause of suit against the respondent.

Further answering the libel and for a second separate and affirmative defense, respondent alleges on information and belief as follows:

I.

Any injuries sustained by the libelant were proximately contributed to and caused, in whole or in part, by his own carelessness and negligence in standing directly under a ladder when another seaman was climbing said ladder and said injuries were not caused by any unseaworthiness or negligence on the part of the respondent.

Wherefore, respondent prays that the libel be dismissed with costs in favor of the respondent and that the Court grant to respondent such other and further relief as the justice of the cause may require.

/s/ C. E. LUCKEY

United States Attorney

/s/ VICTOR E. HARR

Assistant United States Attorney

Proctors for respondent United
States of America

KRAUSE, EVANS & LINDSAY
/s/ DENNIS LINDSAY
/s/ JACK L. KENNEDY

Of Counsel to Respondent

Duly Verified.

[Endorsed]: Filed June 9, 1954.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above entitled proceeding came on regularly for pretrial conference before the undersigned Judge of the above entitled Court on April 11, 1955. Thereupon the following proceedings were had:

Appearances, Proctors for Libelant John Farley: Williams & Alley, David R. Williams; Proctors for Respondent United States of America: C. E. Luckey, United States Attorney, Victor E. Harr, Assistant United States Attorney; Of Counsel to Proctors for Respondent United States of America: Krause, Evans & Lindsay, Dennis Lindsay, Jack L. Kennedy.

Nature of Proceedings

This is a libel in personam instituted by a seaman against the United States under the Suits in Admiralty Act for damages and maintenance and cure arising out of personal injuries allegedly sustained on or about April 6, 1952 by libelant while he was employed by the United States on board the SS Augustin Daly.

Admitted Facts

The following facts are admitted:

1. Libelant is a resident and inhabitant of the State of Oregon.

2. This libel is filed under the Suits in Admiralty Act contained in U.S.C.A., Section 741, to and including Section 752.

3. That at all times herein mentioned the respondent, the United States of America, owned, operated, managed and controlled a certain merchant vessel known as the "SS Augustin Daly", and W. R. Chamberlin & Company, a corporation, acted as the shoreside husband for said vessel pursuant to a "General Agency" Agreement between the respondent and said corporation.

4. On or about the 25th day of March, 1954, libelant mailed a Notice of Claim to W. R. Chamberlin & Company and to the United States Maritime Administration, which claim has never been expressly accepted or rejected. That on or about April 2, 1954, libelant filed his libel herein and commenced this suit.

5. On and prior to April 6, 1952, the libelant was employed by the respondent and was serving as a member of the crew on board the "SS Augustin Daly" in the capacity of Second Assistant Engineer.

6. On and prior to April 6, 1952, Malcolm Edward Potts was employed by the respondent and was serving as a member of the crew on board the

“SS Augustin Daly” in the capacity of Assistant Cook.

7. On or about April 6, 1952, the “SS Augustin Daly” was at anchor in the harbor of Sasebo, Japan, and a “Pilot” or “Jacob’s” ladder was provided as a means of ingress and egress to and from said vessel.

8. On or about April 6, 1952, Malcolm Edward Potts fell into a small boat alongside the “SS Augustin Daly” as he was boarding said vessel. At said time and place the libelant was standing in the said small boat and he sustained certain personal injuries.

9. At the time and place of said accident, the libelant and the said Malcolm Edward Potts were returning to said vessel from shore leave.

10. At the time and place of said accident, the respondent was the employer of the master, officers and crew of said vessel.

11. At the time of said accident, libelant was earning base wages of \$435.89 per month, together with such overtime as he might earn, and he was also entitled to his room and board aboard said vessel.

12. At the time of said accident, libelant was fifty-eight (58) years of age.

13. Respondent has paid the libelant the following amounts in connection with the accident of April 6, 1952:

Maintenance from June 1, 1952 to July 23, except for periods of inpatient care, at \$8.00 a day, together with transporta- tion charges for various trips to Seat- tle	\$2,739.00
Unearned wages from April 7, 1952 to August 13, 1952 (end of voyage)	1,859.79
Expense of hospital and medical treatment in Japan	259.25
Expense of board and room in Japan	132.28
Expense of repatriation from Japan to Vancouver, B. C.	350.00
Transportation expense from Vancouver, B. C. to Portland, Oregon	19.80
Total	\$5,360.12

(Libelant admits the receipt of the above amount but denies the relevancy or materiality of the fact of such payment inasmuch as libelant makes no claim for wages prior to August 13, 1952 or for maintenance or cure prior to July 23, 1953.)

Contentions of Libelant

1. That at the time of the accident causing injuries to libelant, Malcolm Edward Potts and libelant, John Farley, were acting within the scope of and in the course of their employment with respondent.

2. Libelant contends that at the time and place of said accident his injuries were caused without any contributing fault on his part and solely by the defective or unseaworthy condition of said vessel and its appurtenances, and/or the negligence of the

respondent, its officers, agents, and employees in one or more of the following particulars:

(a) Respondent was negligent in providing a "Pilot" or "Jacob's" ladder as the sole means of ingress or egress to said vessel for crew members, and particularly crew members returning from shore liberty.

(b) Respondent was negligent in failing to have in use an accommodation ladder or other companionway type gangway, to provide a safe means of ingress or egress to said vessel by crew members, and particularly crew members returning from shore liberty.

(c) Respondent was negligent in rigging the "Pilot" or "Jacob's" ladder to the boat deck of said vessel, instead of securing said ladder from the main deck of said vessel.

(d) Respondent was negligent in failing to provide a platform or other safe means to alight to the main deck level from the "Pilot" or "Jacob's" ladder rigged in the manner aforesaid.

(e) Respondent was negligent for having failed to instruct crew members of said vessel as to the proper and safe manner in which to ascend and descend the "Pilot" or "Jacob's" ladder rigged as aforesaid, and particularly in failing to instruct a non-licensed member of the crew, Malcolm Edward Potts, as to the proper and safe means in which to ascend said "Pilot" or "Jacob's" ladder.

(f) Respondent was negligent for having failed to supervise the boarding of said vessel by crew members ascending said "Pilot" or "Jacob's" ladder while returning from shore liberty.

(g) Said respondent's servant and employee, Malcolm Edward Potts, was negligent in attempting to climb said "Pilot" or "Jacob's" ladder in boarding respondent's vessel while carrying one bottle in his right hand and another bottle under his left arm.

(h) Respondent was negligent in failing to provide libellant with a safe place in which to work.

(i) Said vessel was unseaworthy in that no safe and seaworthy means of ingress and egress was provided for crew members.

(j) Said vessel was unseaworthy in that a member of said vessel's crew, Malcolm Edward Potts, was an incompetent seaman, and was not equal in seamanship to ordinary men in that calling, in that said Malcolm Edward Potts was totally inexperienced and untrained in the ascent of a "Pilot" or a "Jacob's" ladder.

3. That as a proximate result of the negligence of the above-named respondent and/or the unseaworthiness of said vessel and its appurtenances, libellant was struck and smashed to the deck of a liberty launch which was laying alongside respondent's vessel by the body of respondent's servant, Malcolm Edward Potts, who fell while attempting to step from the said "Pilot" or "Jacob's" ladder to the main deck of respondent's vessel. That as a

result of said accident libelant sustained a concussion and was caused severe and grievous nervous shock and sustained fractures of the right clavicle and multiple compression fractures of several vertebrae in the dorsal and lumbar spine and a severe wrenching, twisting, and tearing of the muscles, ligaments, tendons, nerves and soft tissues of his shoulder and of his upper and lower back; a traumatic capsulitis or fibrosis of the right shoulder joint and limitation of right shoulder joint movement, and a loss of strength in the right arm and a loss of gripping functions of the right hand, and an aggravation of a pre-existing osteoarthritis of the dorsal spine which was previously causing libelant no pain or difficulty, and libelant has been required to provide himself with a brace with which to support his back; that said injuries have caused libelant to suffer severe pain, distress, and mental anguish, and will cause him further pain, distress, and mental anguish; and that all of said injuries are permanent, all to libelant's damage in the amount of Ninety-Six Thousand Two Hundred and Fifty-Seven Dollars (\$96,257.00).

4. That at the time of said accident libelant was a healthy robust man who was capable of engaging in strenuous manual labor, of the age of 58 years with a life expectancy under the U. S. life tables—1949-1951 of 17.05 years; earning the approximate sum of Seven Hundred Dollars (\$700.00) per month exclusive of room and board, as a marine engineer; that libelant has become totally incapacitated and unable to perform any gainful employment by

reason of said accident and as a result of said accident he will be permanently disabled from performing any manual labor or other gainful employment for which he is trained.

5. That as a proximate result of said negligence of the respondent and/or the unseaworthiness of said vessel and its appurtenances, libelant has lost wages on account of said injuries from August 13, 1952, to the present time in the approximate sum of \$24,600.00, and will lose further wages.

6. That medical expenses in the amount of \$1,134.65 has been necessarily incurred to date by libelant for the treatment of injuries received in said accident, and that said expenses have been incurred by libelant subsequent to July 23, 1953, the date on which respondent terminated libelant from further payment for maintenance and cure.

7. That libelant will incur further doctor and medical expenses at least in the sum of \$2,400.00.

8. That libelant is entitled to maintenance and cure at the rate of \$8.00 per day for a period from July 23, 1953, to date, and for an indefinite period of time in the future.

9. That libelant's damages, general and special, were proximately caused by the unseaworthiness of said vessel and/or the negligence of said respondent, its officers, agents, and employees.

10. Libelant denies all of the contentions of respondent except as admitted in libelant's contentions or in the admitted facts.

Contentions of Respondent

1. An administrative claim must expressly be disallowed or 60 days must expire between the filing of said claim and the filing of suit before respondent can be sued herein, and this Court does not have jurisdiction over the person of the respondent or over the subject matter of this suit and the libel and this pretrial order does not state facts sufficient to constitute a cause of suit against the respondent.

2. Any injury received by the libelant was not caused or contributed to in any manner by any negligence of the respondent or of its officers or employees or by any unseaworthiness of the "SS Augustin Daly."

3. Any injury received by the libelant was proximately caused in whole or in part by the negligence of the libelant himself in the following particulars:

(a) In failing to exercise any supervision or control over nonlicensed crew members while returning to said vessel in said shore boat under the circumstances then and there existing.

(b) In failing to supervise, control, correct or prevent any improper boarding of said vessel by nonlicensed crew members under the circumstances then and there existing.

(c) In standing under or near the "Pilot" or "Jacob's" ladder at a time when said Malcolm Edward Potts was climbing said ladder under the circumstances then and there existing.

4. Libelant had received the maximum benefit

of cure on or before July 23, 1953, and he is not entitled to any further maintenance herein.

5. Respondent denies the contentions of the libelant except as admitted in the above contentions or in the admitted facts.

Issues

A. Jurisdiction

1. Does this Court have jurisdiction over the person of the respondent or over the subject matter of this suit because of the failure of libelant to have his claim administratively disallowed before filing his libel herein?

2. Does the libel or this pretrial order state a cause of suit because of the failure of libelant to have his claim administratively disallowed before filing his libel herein?

B. Unseaworthiness

1. Was the vessel unseaworthy in any of the respects contended for by the libelant?

2. If the vessel was unseaworthy, was such unseaworthiness the proximate cause of the accident?

C. Negligence

1. Was respondent negligent in any of the respects contended for by libelant?

2. If respondent was negligent, was such negligence the proximate cause of the accident?

3. Was the libelant negligent in any of the respects contended for by respondent?

4. If libelant was negligent, was such negligence a proximate or a contributing cause of the accident?

D. Damages

1. If respondent is liable to the libelant, what is the extent of the injury or injuries which he received from the accident of April 6, 1952 and what damages has he suffered as a result thereof?

2. If the negligence of libelant was a contributing cause of the accident, to what extent should his damages be mitigated or reduced?

E. Maintenance and Care

1. If respondent is liable to the libelant for any maintenance and cure beyond July 23, 1953, when did libelant reach the point of maximum benefit of cure and how many days is he entitled to the payment of maintenance?

Libelant's Exhibits

1. Deposition of Malcolm Edward Potts.

2-a-b-c. Doctors' office records and X-rays of libelant.

3. Report of William J. Accurso to United States Coast Guard, dated August 21, 1952.

4. Notice of Claim dated March 25, 1954.

5. Agreements between National Maritime Engineers Beneficial Association and Pacific Maritime Association covering Offshore, Intercoastal, and Alaska Trades, 1950 to present date.

6. United States Department of Commerce Continuous Discharge Book for John Farley.

7. Individual overtime statements and pay memoranda covering libelant's employment with Trans-Oceanic Steamship Company during the year 1951.

8. Letter of David R. Williams to Krause, Evans & Lindsay, Attorneys at Law, dated April 3, 1954.

9. Medical bills of libellant.

10. U. S. Life Tables.

11. Actuarial Tables.

12. U. S. Government Rules and Regulations.

13. Depositions.

14. Blueprint of Ship.

[Items 10 to 14 written in pencil.]

Respondent's Exhibits

1. Deposition of libellant.

2. Deposition of Glenn E. Morgan.

3. Deposition of Williams J. Accurso.

4. X-rays of libellant.

5. All clinical and other medical records of John Farley from the United States Marine Hospital, Seattle, Washington.

6. All medical records of John Farley from United States Public Health Service Outpatient Clinic, Portland, Oregon.

7. Smooth and rough log of "SS Augustin Daly" from 0001 February 9, 1952 to 2400 April 10, 1952.

8. X-ray doctors' office records of libellant.

9. Shipping Articles on voyage.

10. License and Oath—Farley (stub).

11. Deposition of S. L. Johnson.

[Items 9 to 11 written in pencil.]

Libellant and respondent admit the identity and authenticity of the foregoing exhibits and waive further identification but the parties reserve all objections to such exhibits on the grounds of rele-

vancy, materiality and competency, and the right to object to any of the questions propounded by the other in any of the depositions and interrogatories and the answers thereto on the grounds of competency, relevancy and materiality.

It is Hereby Ordered that the foregoing constitutes the pretrial order in the above-entitled cause, that it supersedes the pleadings therein and that said pretrial order shall not be amended during the trial except by consent or by order of the court to prevent manifest injustice.

Dated this 14th day of April, 1955.

/s/ GUS J. SOLOMON,

United States District Judge.

The foregoing form of pretrial order is hereby approved.

WILLIAMS & ALLEY,

/s/ DAVID R. WILLIAMS,

Proctors for Libelant John Farley

/s/ C. E. LUCKEY,

United States Attorney

/s/ VICTOR E. HARR,

Assistant United States Attorney

Proctors for Respondent United
States of America

KRAUSE, EVANS & LINDSAY,

/s/ DENNIS LINDSAY,

/s/ JACK L. KENNEDY,

Of Counsel to Proctors for Respond-
ent United States of America

[Endorsed]: Filed April 14, 1955.

[Title of District Court and Cause.]

MINUTE ORDER

July 27, 1955

Now at this day come the libelant by Mr. Leonard D. Alley and Mr. David R. Williams, of proctors, and the respondent by Mr. Gunther F. Krause and Mr. Chick Chaloupka, of proctors. Whereupon, this cause comes on for trial before the Court, and the Court having heard the statements of proctors,

It Is Ordered that the parties hereto, be, and are hereby, allowed to amend the pre-trial order filed herein.

Thereafter, the Court having heard the evidence adduced, the trial of this cause is continued to tomorrow, Thursday, July 28, 1955, at ten o'clock a.m.

[Title of District Court and Cause.]

MINUTE ORDER

July 29, 1955

Now at this day come the libelant by Mr. Leonard D. Alley and Mr. David R. Williams, of proctors, and the respondent by Mr. Gunther F. Krause and Mr. Chick Chaloupka, of proctors. Whereupon, the trial of this cause before the Court is resumed, and the Court having heard the evidence adduced,

It Is Ordered that the libelant be, and is hereby, allowed to and including August 3, 1955, within which to file his brief; that respondent be, and is hereby, allowed to and including August 9, 1955, within which to file its answering brief, and that the libelant be, and is hereby, allowed to and in-

cluding August 12, 1955, within which to file his reply brief.

[Title of District Court and Cause.]

RESPONDENT'S BRIEF

* * * * *

Libelant claims to have suffered a wage loss of approximately \$23,000.00. In view of the slack conditions of American shipping since termination of the Korean war, it is extremely problematical as to the amount of employment that libelant would have had. In all probability, his earnings from August 14, 1952 to the date of the trial would not have exceeded \$15,000.00.

Libelant is now 61 years of age. While there are older men serving as marine engineers, according to the testimony they were usually chief engineers and libelant holds only a second assistant's license. His failure to qualify for a higher rating in nearly 30 years as a second assistant would justify the conclusion that he would not qualify hereafter. It would therefore seem reasonable to conclude that libelant might anticipate some employment as a marine engineer until the age of 65. At that age he would qualify for the social security pension. In our view, his future earnings, had he not been injured, would be high if placed at \$20,000.00.

If libelant was injured solely through the fault of respondent, an award of from \$35,000.00 to \$40,000.00 would be fully compensatory. Assuming that respondent was at fault in any of the particu-

lars charged by libelant and that he was guilty merely of contributory negligence, it is our belief that the fault of respondent could in no view of the testimony be regarded as greater than that of libelant, and an award of from \$17,500.00 to \$20,000.00 would be proper.

* * * * *

[Endorsed]: Filed August 15, 1955.

MEMORANDUM OPINION

November 8, 1955

David R. Williams

Williams & Alley

Attorneys at Law

1212 Failing Building

Portland 4, Oregon

Gunther Krause

Krause, Evans & Lindsay

Attorneys at Law

Portland Trust Building

Portland 4, Oregon

James Morrell

Assistant United States Attorney

U. S. Courthouse

Portland 5, Oregon

Re: John Farley vs. The United States of America, No. 7435.

Gentlemen:

The Court regrets the delay involved in determination of the above entitled matter. The Court has now had an opportunity to consider the evi-

dence and the law of the matter and concludes that the Court has jurisdiction of the parties and of the subject matter presented and is of the opinion that the evidence in behalf of libelant does not establish that the respondent, acting through the master, officers and the crew of the S. S. Augustin Daly, was negligent in any of the particulars set forth in the contentions of libelant. Nor that said vessel was unseaworthy in the particulars set forth in libelant's contentions.

It may be that the situation was due to the necessity of distant land travel in Japan following the accident, nevertheless the Court cannot refrain from commenting that it most strongly appears from the evidence that the seaman libelant received wholly inadequate diagnosis and medical treatment and care following his injury. I think he was treated very shabbily. However, this is a matter and situation for which the master, officers and crew of the vessel, so far as this matter is concerned, are not responsible.

The Court is further of the opinion that it is established by the preponderance of all the evidence in the case that the libelant was acting in the course of his employment as a member of the vessel's crew at the time and place of the accident and that the libelant did not reach "the maximum cure (of the injury sustained) within the reach of medical science" until July 21, 1955, and that therefore the libelant is entitled to have and recover of and from the respondent additional maintenance as allowable by law from and after July

23, 1953 until July 21, 1955, at the rate of \$8.00 per day.

Proctors for the libelant are requested to draw appropriate Findings, Conclusions and Judgment in conformity with this advice.

Very truly yours

WGE/J

.....

[Endorsed]: Filed November 8, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 27th day of July, 1955, libelant being present in person and represented by David R. Williams, Esq., one of his proctors, and respondent appeared by Gunther F. Krause, Esq., one of its proctors. A pre-trial order had been presented and approved by proctors for both parties and signed by the Court on the 14th day of April, 1955, and the parties proceeded to trial upon the issues presented by said pretrial order. The Court having heard and considered the evidence and having taken said cause under advisement and having considered the statements and briefs submitted by counsel, and being now advised in the premises, makes its

Findings of Fact

1. The Court adopts and enters among its Findings of Fact each and all of the facts designated as admitted facts by the parties in the aforesaid

pretrial order and being designated paragraphs numbered 1 to 13, both inclusive.

2. That at the time Malcolm Edward Potts was boarding the vessel as set forth in admitted fact number 8, he fell a distance of approximately 19 feet into the small boat located alongside said vessel, and at said time and place the falling body of Malcolm Edward Potts struck the libelant who was standing in said small boat as aforesaid. That at the time of said accident both Malcolm Edward Potts and the libelant were acting within the scope and in the course of their employment with respondent.

3. That at the time the said Malcolm Edward Potts was boarding said vessel through the use of a Jacob's ladder he was intoxicated and was carrying bottled goods in his hand and under his arm while climbing the ladder.

4. Libelant did not sustain his injuries because of any defective or unseaworthy condition of the vessel and her appurtenances or the negligence of respondent, its officers, agents and employees in any of the particulars set forth and claimed in the contentions of libelant set forth in the aforesaid pretrial order and being numbered paragraphs 1 and 2, and sub-section 2-a through 2-j, all included.

5. That if the vessel was unseaworthy or respondent, its agents or servants, was negligent in any of the particulars appearing in libelant's contentions, such unseaworthiness or negligence was not the proximate cause of libelant's injuries.

6. That the libelant's injuries received as afore-

said were not the result of any wilful misconduct on his part.

7. That the libelant did not obtain the maximum cure within the reach of medical science for his injuries aforesaid until July 21, 1955.

8. After the United States Public Health Service terminated libelant's treatment, the latter necessarily incurred expenses for further medical treatment in the reasonable sum of \$1357.00.

9. The sum of \$8.00 per day is a reasonable sum to be allowed libelant for the period from July 24, 1953 to and including July 21, 1955.

Based upon the foregoing Findings of Fact, the Court makes the following

Conclusions of Law

I.

The Court has jurisdiction over the parties and the subject matter of this suit.

II.

Respondent's vessel was not unseaworthy in any of the particulars stated in libelant's contentions.

III.

Respondent was not negligent in any of the particulars stated in libelant's contentions and libelant's injuries were not proximately caused by any act or neglect stated in libelant's contentions.

IV.

Libelant was not negligent in any of the particulars set forth in the contentions of respondent, being particularly paragraph 3, 3-a through 3-c, all inclusive.

V.

Libelant is not entitled to recover damages from respondent and his libel for damages should be dismissed.

VI.

Libelant is entitled to recover from respondent additional maintenance from July 24, 1953 to July 21, 1955, inclusive, at the rate of \$8.00 per day, or a total of \$5,816.00.

VII.

Libelant is entitled to recover from respondent his expenses of medical treatment in the amount of \$1,357.00.

VIII.

Libelant is entitled to recover his costs and disbursements.

Dated, December 5, 1955.

/s/ WILLIAM G. EAST,
U. S. District Judge.

[Endorsed]: Filed December 5, 1955.

[Title of District Court and Cause.]

DECREE

This cause came on regularly for trial before the Honorable William G. East, judge of the above entitled court, libelant being present in person and represented by David R. Williams, Esq., one of his proctors, and respondent appeared by Gunther F. Krause, Esq., one of its proctors. A pretrial order

had been presented and approved by proctors for both parties and signed by the court on the 14th day of April, 1955, and the parties proceeded to trial upon the issues presented by said pretrial order. The court having heard and considered the evidence and having taken said cause under advisement and having considered the statements and briefs submitted by counsel and having made and filed its Findings of Fact and Conclusions of Law,

It is now here ordered and decreed as follows:

1. That the libel for damages be and the same hereby is dismissed.

2. That libelant have and recover of and from respondent the sum of \$5816.00 on account of maintenance to and including July 21, 1955, and the further sum of \$1357.00 for medical expenses, and libelant's costs and disbursements herein taxed at \$172.51.

Dated this 5th day of December, 1955.

/s/ WILLIAM G. EAST,
District Judge

[Endorsed]: Filed December 5, 1955.

[Title of District Court and Cause.]

ORDER

It appearing to the Court that heretofore on December 5, 1955, an order was made and entered herein denying the libelant's motion for a reconsideration of the Court's decision as expressed in

the memorandum opinion filed herein on November 8, 1955, and the Court being further advised in the premises,

It is hereby adjudged and ordered, that the aforesaid order dated December 5, 1955, be and the same is hereby set aside and held for naught.

It is further ordered, that the matter of libelant's motion as aforesaid be and the same is hereby held for further consideration.

Dated, December 22, 1955.

/s/ WILLIAM G. EAST,
U. S. District Judge

[Endorsed]: Filed December 22, 1955.

[Title of District Court and Cause.]

ORDER

The Court having had under consideration of matter of libelant's motion that the Court reconsider its decision as expressed in the memorandum opinion filed herein on November 8, 1955, and having heard further argument and statement of the proctors for the respective parties, being now further advised in the premises, concludes that the decision aforesaid, the Findings of Fact and Conclusions of Law made and entered herein on December 5, 1955, and the Court's Decree made and entered herein on December 5, 1955, are erroneous under the facts and law of the matter.

Therefore, it is considered, adjudged and ordered, that the aforesaid Findings of Fact, Con-

clusions of Law and Decree, and each of them be and the same are hereby set aside and held for naught, and the matter reserved by the Court for further disposition herein.

Dated, January 27, 1956.

/s/ WILLIAM G. EAST,
U. S. District Judge

[Endorsed]: Filed January 27, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 27th day of July, 1955, libelant being present in person and represented by David R. Williams, Esq., one of his proctors, and respondent appeared by Gunther F. Krause, Esq., one of its proctors. A pretrial order had been presented and approved by proctors for both parties and signed by the Court on the 14th day of April, 1955, and the parties proceeded to trial upon the issues presented by said pretrial order. The Court having heard and considered the evidence and having taken said cause under advisement and having considered the statements and briefs submitted by counsel, and being now advised in the premises, makes its

Findings of Fact

1. The Court adopts and enters among its Find-

ings of Fact each and all of the facts designated as admitted facts by the parties in the aforesaid pretrial order and being designated paragraphs numbered 1 to 13, both inclusive.

2. That at the time Malcolm Edward Potts was boarding the vessel as set forth in admitted fact number 8, he fell a distance of approximately 19 feet into the small boat located alongside said vessel, and at said time and place the falling body of Malcolm Edward Potts struck the libelant who was standing in said small boat as aforesaid, thereby causing libelant certain injuries.

3. That at the time and place of the fall of the said Malcolm Edward Potts, he was boarding respondent's vessel through the use of respondent's pilot or Jacob's ladder, and he was carrying one bottle in his right hand and another bottle under his left arm.

4. That the fall of Potts from the said pilot or Jacob's ladder was caused by the fact that he was encumbered with bottles as aforesaid, and the Court finds that said acts by respondent's servant Potts constitute negligence which proximately caused libelant's injuries.

5. That at the time and place of said accident, both Malcolm Edward Potts and the libelant were acting within the scope and in the course of their employment with respondent.

6. That the sole proximate cause of libelant's injuries was the negligence of respondent's servant Potts, and no acts or failure to act on the part of

libelant proximately caused or contributed to his injuries.

7. That libelant's injuries proximately caused by respondent's servant's negligence were a concussion and nervous shock, fracture of the right clavicle, fractures of the seventh, eighth, tenth and twelfth dorsal vertebrae, a severe wrenching and tearing of the muscles, ligaments, tendons, and soft tissues of the right shoulder and back, an irritation of the nerves in the back area, a traumatic capsulitis or fibrosis of the right shoulder joint, and an aggravation of a dormant pre-existing osteo-arthritis of the spine.

8. That by reason of said injuries, libelant has suffered considerable pain and distress, will permanently suffer pain and distress, has sustained a permanent limitation of motion in the right shoulder joint, a permanent limitation of motion and instability of the dorsal spine, a loss of strength and gripping function of the right arm and hand, and has become totally and permanently disabled from following his usual and ordinary occupation of merchant marine engineer or any other heavy employment, and is further permanently disabled to the extent of fifty per cent from performing light duty employment.

9. That at the time of libelant's said injury he was a healthy robust man, capable of engaging in strenuous labor, of the age of 58 years, with a life expectancy under United States Life Tables, 1949-1951, of 17.05 years, earning the approximate sum of \$700.00 per month, exclusive of room and board,

as a second assistant marine engineer; that libelant was, excepting one day, unemployed from the date of his injury, April 6, 1952, to the date of trial, July 27, 1955, as a result of said injuries; that since August 13, 1952, libelant has lost wages and will lose further wages by reason of said injuries.

10. That libelant sustained general and special damages as a proximate result of said accident in the amount of \$8,500.00.

11. That libelant did not obtain the maximum cure within the reach of medical science for his injuries aforesaid until July 21, 1955.

12. That after the United States Public Health Service terminated libelant's treatment in July, 1953, libelant necessarily incurred expenses for further medical treatment in the reasonable sum of \$1,357.00.

13. That libelant is entitled to maintenance from July 24, 1953, to and including July 21, 1955, at the rate of \$8.00 per day, which the Court finds to be a reasonable sum for maintenance.

Based upon the foregoing Findings of Fact, the Court makes the following

Conclusions of Law

I.

The Court has jurisdiction over the parties and the subject matter of this suit.

II.

The negligence of respondent's servant Potts was the sole proximate cause of libelant's injuries and

respondent is liable for the negligence of its servant Potts.

III.

Libelant was not negligent in any respect which proximately caused or contributed to his injuries.

IV.

Libelant is entitled to recover general and special damages from respondent in the total amount of \$8,500.00.

V.

Libelant is entitled to recover from respondent additional maintenance from July 24, 1953 to July 21, 1955, inclusive, at the rate of \$8.00 per day, or a total of \$5,816.00.

VI.

Libelant is entitled to recover from respondent his expenses of medical treatment in the amount of \$1,357.00.

VII.

Libelant is entitled to recover his costs and disbursements incurred herein.

Dated, March 23, 1956.

/s/ WILLIAM G. EAST,
U. S. District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed March 23, 1956.

In the United States District Court
for the District of Oregon

Civil No. 7435

JOHN FARLEY,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

DECREE

This cause came on regularly for trial before the Honorable William G. East, Judge of the above entitled Court, libelant being present in person and represented by David R. Williams, Esq., one of his proctors, and respondent appeared by Gunther F. Krause, Esq., one of its proctors. A pretrial order had been presented and approved by proctors for both parties and signed by the Court on the 14th day of April, 1955, and the parties proceeded to trial upon the issues presented by said pretrial order. The Court having heard and considered the evidence and having taken said cause under advisement and having considered the statements and briefs submitted by counsel and having made and filed its Findings of Fact and Conclusions of Law dated March 23rd, 1956,

It is now here ordered and decreed as follows:

1. That libelant recover from respondent on his libel for damages the sum of \$8,500.00.
2. That libelant have and recover of and from respondent the sum of \$5,816.00 on account of

maintenance to and including July 21, 1955, the further sum of \$1,357.00 for medical expenses, and libelant's costs and disbursements herein taxed at \$172.51.

Dated this 23rd day of March, 1956.

/s/ WILLIAM G. EAST,
District Judge

[Endorsed]: Filed March 23, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: United States of America as Respondent, C. E. Luckey, United States Attorney, Proctor for Respondent, and Krause, Evans & Lindsay, of Counsel to Proctors for Respondent, and R. DeMott, Clerk of the United States District Court for the District of Oregon:

You and each of you will please take notice that John Farley, libelant in the above entitled cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that portion of the findings of fact, conclusions of law, and decree entered herein on or about the 23rd day of March, 1956, which finds, orders, and decrees that libelant is entitled to recovery from respondent upon his libel for damages the sum of \$8,500.00 only, for the damages, both general and special, for which this libel was commenced.

On the appeal, the libelant desires to review only

the question of the adequacy of general and special damages awarded to libelant by the Court herein.

Dated this 20th day of June, 1956.

/s/ DAVID R. WILLIAMS

Of Proctors for Libelant,

WILLIAMS & ALLEY

Acknowledgment of Service attached.

[Endorsed]: Filed June 20, 1956.

[Title of District Court and Cause.]

NOTICE AND ALLOWANCE OF APPEAL

Notice is hereby given that the United States of America, the respondent above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the decree entered herein on March 23, 1956.

/s/ C. E. LUCKEY,

United States Attorney,

Proctor for Respondent United
States of America

KRAUSE, EVANS & LINDSAY

Of Counsel to Proctor for Respond-
ent, United States of America

The foregoing appeal is hereby allowed.

Dated at Portland, Oregon, this 20th day of June,
1956.

/s/ WILLIAM G. EAST,

United States District Judge

[Endorsed]: Filed June 20, 1956.

[Title of District Court and Cause.]

UNDERTAKING FOR PAYMENT OF COSTS
ON APPEAL

Know All Men by These Presents, That we, John Farley, Libelant herein, as Principal, and Saint Paul-Mercury Indemnity Company, a corporation organized and existing under the laws of the State of Delaware, and authorized under the laws of the State of Oregon to become surety upon bonds, in the State of Oregon, as Surety, are held and firmly bound unto the United States of America, Respondent, and to its successors and assigns, in the above entitled Court and Cause, in the sum of Two Hundred Fifty & No/100 (\$250.00 Dollars, lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Whereas, John Farley, Libelant herein, has appealed to the United States Court of Appeals for the Ninth Circuit from a decree, conclusions and findings of the District Court of the United States for the District of Oregon, made and entered on or about March 23, 1956, in the above entitled cause;

Now, Therefore, the Condition of This Obligation Is Such, That, if the above named Appellant, John Farley, shall prosecute said appeal with effect and pay all costs which may be awarded against him

as such Appellant if the appeal is not sustained, and shall abide by and perform whatever decree may be rendered by the United States Court of Appeals for the Ninth Circuit in this cause, or on the mandate of said Court by the Court below, then this obligation shall be void; otherwise, same shall remain in full force and effect.

In witness whereof, the said Principal has caused these presents to be signed and executed and the said Surety has caused these presents to be duly executed by its respective duly authorized legal representatives and its corporate seal to be hereunto affixed, on this 25th day of June, 1956.

/s/ JOHN FARLEY,

Principal

[Seal] SAINT PAUL-MERCURY
INDEMNITY COMPANY,

/s/ By D. WILSON,

Its Attorney-in-Fact,

Surety

Countersigned:

CAMPBELL & MACNAB,

/s/ By L. B. MACNAB,

Resident Agent, Residing at
Portland, Oregon

Acknowledgment of Service attached.

[Endorsed]: Filed June 27, 1956.

[Title of District Court and Cause.]

LIBELANT-APPELLANT'S ASSIGNMENTS OF ERROR

1. The Trial Court erred in its findings and conclusions and Decree dated March 23, 1956, with respect to an award upon the libel for damages in the following particulars:

(a) Said award of \$8,500.00 was approximately one-third ($\frac{1}{3}$) of the wage loss which libelant proved he sustained between the date of injury and the date of trial.

(b) Said award of \$8,500.00 was grossly inadequate to compensate the libelant for the loss of wages, both past and to be reasonably expected in the future, and the pain, suffering and disability which the evidence proved was sustained by libelant as a result of respondent's negligence.

(c) Said award of \$8,500.00 was grossly inadequate to compensate libelant for the injuries, loss of wages, pain, suffering and disability which the Trial Court found (Findings of Fact numbered 7, 8 and 9) were sustained by libelant as a result of respondent's negligence.

(d) Under the evidence, the Findings of Fact numbered 7, 8 and 9, made and entered by the Trial Court, the Trial Court should have found libelant's full damages to be in an amount not less than \$92,000.00.

Respectfully submitted this 27th day of June, 1956.

/s/ DAVID R. WILLIAMS
Of Proctors for Libelant,
WILLIAMS & ALLEY

Acknowledgment of Service attached.

[Endorsed]: Filed June 27, 1956.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the proctors for the respective parties hereto that all exhibits offered or received in evidence at the trial of the above entitled case may be transmitted in their original form to the United States Court of Appeals for the Ninth Circuit, to be made a part of the record on appeal without the necessity of reproduction, excepting however, the following exhibits as to which the parties agree that photostatic copies may be substituted for the original exhibit, which original exhibit may be withdrawn and returned to the respective parties offering the same:

1. Respondent's Exhibit 7 (Rough and Smooth Log of the "SS Augustin Daly" from 0001 February 9, 1952, to 2400 April 10, 1952).
2. Libelant's Exhibit 6 (United States Department of Commerce Continuous Discharge Book for John Farley).

Dated this 20th day of July, 1956.

/s/ DAVID R. WILLIAMS
Of Proctors for Libelant,
WILLIAMS & ALLEY

/s/ VICTOR E. HARR,
Assistant United States Attorney,
Proctor for Respondent, United
States of America

/s/ GUNTHER F. KRAUSE
Of Counsel to Proctors for
Respondent,
KRAUSE, EVANS & LINDSAY

[Endorsed]: Filed July 20, 1956.

[Title of District Court and Cause.]

ORDER

Based upon the stipulation entered into by the counsels for the respective parties in the above entitled case,

It is hereby ordered that all exhibits offered or received in evidence at the trial of the above entitled case shall be transmitted by the Clerk of this Court in their original form to the United States Court of Appeals for the Ninth Circuit, to be made a part of the record on appeal without the necessity of reproduction, excepting however, the Respondent's Exhibit 7 and Libelant's Exhibit 6, as to which exhibits photostatic copies will be substituted for the originals and said original ex-

hibits shall be returned to the respective parties offering same.

Dated this 20th day of July, 1956.

/s/ WILLIAM G. EAST,
District Judge

Received Libelant's Exhibit 6 this 20th day of July, 1956.

/s/ DAVID R. WILLIAMS

Received Respondent's Exhibits 7 and 7(a) this 20th day of July, 1956.

/s/ DAVID R. WILLIAMS

[Endorsed]: Filed July 20, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Libel in personam; Exceptions; Order overruling exceptions; Answer; Pre-trial order; Order allowing parties to amend pre-trial order; Order allowing time for briefs; Respondent's brief; Memorandum opinion; Findings of fact and conclusions of law; Decree; Order dated December 22, 1955; Order setting aside findings of fact, conclusions of law and decree; Findings of fact and conclusions of law; Decree; Notice of appeal; Designation of rec-

ord on appeal; Undertaking for payment of costs on appeal; Libelant - appellant's assignments of error; Designation of record on appeal; Stipulation re exhibits; Order to transmit exhibits to Court of Appeals; supplemental designation of record on appeal; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7435, in which John Farley is the libelant and appellant and United States of America is the respondent and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and the appellee, and in accordance with the rules of this court.

I further certify that the reporter's transcript will be forwarded when it is received and filed in this office. All exhibits are being forwarded by the attorneys for the appellant.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 25th day of July, 1956.

[Seal] R. DE MOTT,
Clerk

/s/ By THORA LUND,
Deputy

United States District Court
District of Oregon

Civil No. 7435

JOHN FARLEY,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

TRANSCRIPT OF TESTIMONY

Before: Honorable William G. East, U. S. District Judge.

July 27, 28, 29, 1955. United States Courthouse, Portland, Oregon.

Appearances: Messrs. David R. Williams, Leonard D. Alley, Attorneys for Libelant; Messrs. Gunther F. Krause, Chick Chaloupka, of Attorneys for Respondent.

(Whereupon the following proceedings were had:) [1]*

LEO M. ZALESKI

produced as a witness on behalf of the Libelant, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Williams): May I have your name, please?
A. Leo M. Zaleski.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Leo M. Zaleski.)

Q. And, where do you reside, Mr. Zaleski?

A. 7325 Southeast Insley.

Q. Portland, Oregon?

A. Portland, Oregon.

Q. And, what is your occupation or trade, Mr. Zaleski?

A. Marine engineer.

Q. You are a marine engineer?

A. Yes.

Q. What class?

A. Third assistant.

Q. I see. How long have you gone to sea, Mr. Zaleski, sailing merchant vessels?

A. Twelve years.

Q. What licenses or categories have you been in during that time? [2]

A. Well, junior third assistant, fourth assistant, acting second assistant, and third assistant, oiler, fireman, junior engineer.

Q. Do you hold a second or third assistant license at this time?

A. Yes.

Q. Marine engineer?

A. Yes, sir.

Q. And, were you employed aboard a vessel known as the SS Augustin Daly in the year 1952?

A. I was.

Q. Do you recall when the voyage commenced?

A. February 21st, I believe it was.

Q. Of 1952?

A. Uh huh.

Q. And, you say you went aboard that ship. Did you sign articles aboard her?

A. Yes.

Q. In what category?

A. Third assistant.

Q. Third assistant marine engineer?

A. Yes.

(Testimony of Leo M. Zaleski.)

Q. And, you sailed from Portland, Oregon, then, you said in February? [3]

A. Well, we sailed in March, I believe it was, when we left but I went aboard in February.

Q. From Portland, Oregon, where did you go?

A. Well, we went to Coos Bay and then we come back to Portland.

Q. What I mean, Mr. Zaleski, is when you left Portland you went to the Orient, did you not?

A. Oh, yes. Sasebo.

Q. Sasebo, Japan, is it? A. Yes.

Q. About when did you arrive there? May I ask you this question, Mr. Zaleski: About how many days did you spend crossing?

A. Well, about twenty days I believe it was.

Q. Yes. Do you know approximately what date you arrived in Sasebo, Japan?

A. No, I don't recall right now.

Q. Would it be around the first of April?

A. Yes.

Mr. Williams: I believe counsel will agree with me that Mr. Farley was injured shortly after midnight on the 6th of April which was the fifth day that the vessel had been at Sasebo, is that not correct, Mr. Krause?

Mr. Krause: Well, I don't know she could arrive on the 2nd of April and he got hurt just after [5] midnight on the 6th. Now, that doesn't look like five days to me but maybe it is.

Mr. Williams: Doesn't the log show arrival on the 1st?

(Testimony of Leo M. Zaleski.)

Mr. Krause: Well, I thought it was on the 2nd.

The Court: Well, if you can't agree let's get the log.

Q. (By Mr. Williams): At any rate, Mr. Zaleski, did you go ashore on liberty prior to the time when Mr. Farley was injured, if you can recall, in Sasebo?

A. Well, I am not certain.

Q. You didn't go ashore with Mr. Farley---

A. No.

Q. —during the time there? Do you know what appliance was provided for the men to go from the deck of the vessel to the liberty launch alongside the vessel to go ashore?

A. Yes.

Q. What was it?

A. Jacob's ladder.

Q. Jacob's ladder. Is that sometimes referred to as a pilot ladder?

A. Yes, sir.

Q. Will you describe the pilot ladder that was used, if you can recall it?

A. Well, it consists of four lines with wood rods fastened into oval—oval-shaped wooden side boards and these rods are put in them and then these [5] lines—they are set in between the two lines and then they are seized around up above and below each one of the oval disks or side boards.

Q. The ladder as such, is it flexible?

A. Yes.

Q. It is not rigid?

A. No.

Q. Yes. When did you first learn of Mr. Farley's injury?

A. Oh, a few minutes after it happened I heard commotion and went out to see what happened and Mr. Farley was stretched out on the deck of the

(Testimony of Leo M. Zaleski.)

launch and I asked what happened and nobody seemed to know anything right then and then a few minutes later, well, somebody said that somebody fell on him. But, I didn't know who it was that had fallen.

Q. The Jacob's ladder was there at that time, was it not? A. Uh huh.

Q. Did you ever go down aboard the launch following Mr. Farley's injury? A. No.

Q. To assist him or anything like that? You did not? A. No.

Q. Now, Mr. Zaleski, you have served the last 12 years at sea, is that correct?

A. Approximately.

Q. Now, are you familiar with any practices or customs in the maritime industry with regard to [6] the use of certain types of appliances for furnishing men a means of ingress and egress to and from the vessel when shore liberty is granted?

A. Yes.

Q. Are you familiar with those practices?

A. (Witness nods head.)

Q. What type of device is customarily employed?

(At this point an objection was made by Mr. Krause and the Court sustained the objection to the form of the question.)

Q. (By Mr. Williams): Mr. Zaleski, will you first describe, if you recall, the accommodation ladder which was aboard the SS Augustin Daly?

(Testimony of Leo M. Zaleski.)

A. Well, it was a rigid wooden ladder that is made up in two sections.

Q. Will you describe how it is——

A. And——

Q. ——fastened to the vessel for use when the vessel is at anchor?

A. Well, on the main deck they have a platform which is—when the ship is at sea they pull that up and it forms part of the ship's side, the gunwales, when she is at anchor. Well, they lower that down and they fasten this one end of the ladder to it by shackles and the other end is fastened to the lifeboat falls—one of the lifeboat falls is taken off and hooked onto this ladder with [7] chains—bridle-like chains coming up and across forming an arch and this fall is fastened onto it and that holds the free end up for raising or lowering, whichever you may need to do.

Q. Is the ladder in against the side of the ship?

A. Fairly close, yes.

Q. Yes. Is there a platform, you say, on top to which the accommodation ladder is fastened?

A. Yes, sir.

Q. From that platform do you have to get over the rail or is that on the same——

A. No; that's right on the deck.

Q. I see. A. The rail swings out.

Q. Oh. There is a removing place at the rail there? A. There is a gate there.

Q. So that you don't have to climb over the rail? A. Yes.

(Testimony of Leo M. Zaleski.)

Q. Does the accommodation ladder have hand-rails on it?

A. Some have rails, some have lines.

Q. Yes. Will you describe the one on the Augustin Daly, if you recall?

A. If I recall, I think she had lines, just ropes strung down through there and fastened on one end and fastened to the ship's side—or, rather, on the ship up at the other end. [8]

Q. What device holds these ropes?

A. Well, rods—iron rods with eyes through them.

Q. Do you call them stanchions?

A. Stanchions.

Q. And, the rope goes through the stanchions to provide a handrail, is that correct?

A. (Witness nods head.)

Q. On both sides? A. Yes, sir.

Q. The accommodation ladder, did you state that it was in two pieces or in one piece?

A. I believe it was in two pieces.

Q. Two pieces. Well, approximately how long would each section be?

A. Ten, twelve feet.

Q. Ten, twelve feet?

A. (Witness nods head.)

Q. Those sections are bolted, fastened, or shackled, together in some fashion?

A. Bolted. They are movable.

The Court: You could separate them, couldn't you?

(Testimony of Leo M. Zaleski.)

The Witness: Yes.

Q. (By Mr. Williams): Do you recall where the accommodation ladder was on the vessel while the vessel was in port at Sasebo? Do you remember where it was? [9]

A. I am not sure.

Q. Do you recall the approximate draft of the vessel? I mean by that was she deeply loaded while in Sasebo?

The Court: Well, I want to know at the time of the accident not any before dates.

Mr. Williams: Well, your Honor, the question involved is a little broader than that because of the decisions to use this Jacob's ladder for a period providing shore liberty for approximately four days.

The Court: Well, all right.

Q. (By Mr. Williams): Do you recall that question, Mr. Zaleski? A. No.

Q. I will repeat it. Do you recall when the ship arrived in Sasebo if she was heavily loaded, the Augustin Daly? A. Yes.

Q. Was her cargo discharged there, some of it?

A. I believe so.

Q. What cargo, if you recall—would it be out of the holds or is it the deck?

A. I believe it was off the deck.

Q. The draft of the vessel, did it change during the time it was in Sasebo? A. Yes.

Q. She came out of the water as she was unloaded? A. Uh huh. [10]

Q. Do you know how much freeboard existed

(Testimony of Leo M. Zaleski.)

at the time of Mr. Farley's injury; that is, the distance from the water up to the main deck?

A. Well, I am not sure about that.

Q. You don't recall how far——

A. No, I don't.

Q. ——below you the liberty launch was when you looked down?

A. Might have been fifteen, twenty feet.

Q. Yes.

The Court: Well, are you just guessing?

The Witness: About fifteen feet, I would judge, by the oil that was consumed and water and so forth, on the cargo removed. It raised it up.

The Court: All right.

Q. (By Mr. Williams): Mr. Zaleski——

The Court: May I interrupt so that I can clarify a point in the opening statement?

Mr. Williams: Surely.

The Court: Do you recall whether the ladder was suspended from the point at the main deck or did it go on up to the boat deck?

The Witness: I believe it was on the main deck, as nearly as I can recall, fastened on the main deck.

The Court: All right. [11]

Mr. Williams: You Honor will find considerable conflict in various depositions on the point.

The Court: I wanted to clarify this witness' point because I understand that is quite an issue.

Q. (By Mr. Williams): Mr. Zaleski, I am going to ask your opinion on this next question based on the following assumed facts. Assume that a liberty-

(Testimony of Leo M. Zaleski.)

type vessel is in the harbor at Sasebo, Japan, and, further, that the freeboard of the vessel at this particular time is approximately fifteen feet. I will ask your opinion as to whether under those circumstances a Jacob's ladder is a safe means by which to provide shore liberty for a crew?

The Court: Don't answer the question.

(At this point an objection was made by Mr.

Krause and the Court sustained the objection.)

Q. (By Mr. Williams): Mr. Zaleski, at the time in question when Mr. Farley was injured would you describe the place in the harbor where the SS Augustin Daly was; that is to say, was it out in the open sea or was it in behind the breakwater or in a harbor of some kind?

A. Oh, it was in a very well sheltered harbor.

Q. And, what was the condition of the water around there, was it rough or smooth?

A. Smooth.

Q. The Jacob's ladder that you have previously [12] referred to which was employed aboard the Augustin Daly, is that a standard type of Jacob's ladder or pilot ladder——

A. Yes.

Q. ——customarily employed? A. No.

Q. It is not? In what respect is it different?

A. Well, I will—what do you mean "customarily employed"? You mean——

Q. I mean whether used at all?

A. Oh, yes. Well, it is the customary Jacob's ladder.

Q. All right. I am going to ask you for your

(Testimony of Leo M. Zaleski.)

opinion on this question based on the following assumed facts. Assume that shore liberty is to be given various crew members aboard a liberty-type vessel which is anchored in a sheltered harbor where the water is smooth. I will ask your opinion whether or not under those circumstances is a Jacob's ladder a safe and proper appliance to be used for affording men ingress and egress to and from the ship for shore liberty? A. No.

(Whereupon an objection was made by Mr. Krause which was sustained as to the form of the question by the Court.)

Q. (By Mr. Williams): Mr. Zaleski, I will ask you the following hypothetical and your opinion thereon based upon these assumed facts. Assume [13] that a shore leave is to be given to the crew members aboard a liberty-type vessel which is anchored in a protective harbor in smooth water; further assume that at the particular time in question that the standard form of Jacob's ladder such as you have previously described is to be used and that it is nighttime, approximately midnight; and, further, that a form of lighting is provided on the deck of the vessel which gives some light over the edge or gunwale of the vessel. I ask you whether or not under those circumstances which you are asked to assume, is a Jacob's ladder a fit and proper appliance to provide ingress and egress to the crew in going to and returning from shore liberty?

(Testimony of Leo M. Zaleski.)

The Court: Please don't answer the question until counsel has had a chance to object.

(Whereupon Mr. Krause objected and upon the Court's suggestion the hypothetical question was held in abeyance until one of the facts contained in the question was cleared up.)

Q. (By Mr. Williams): Mr. Zaleski, do you recall the lighting which was there on the side of the ship at the time of Mr. Farley's injury? What sort of lighting was available?

A. Well, I believe—I believe we have one of the boat lights and a cargo lamp.

Q. And, what sort of light would that provide or do you know? [14]

A. Well, it's about 800 watts, I think it was.

Q. Where would the light shine?

A. Well, one was directed from the after end of the boat deck and the other was from the forward end and it was aimed at the Jacob's ladder or in that area.

Q. Did it afford some light on the Jacob's ladder? A. Yes.

Q. Was it bright or somewhat in darkness or what would you say?

A. Well, I wouldn't call it bright nor dark. Well, kind of dim.

Q. What sort of light was available on the deck of the liberty launch?

A. Only what come from the lights that was illuminating the water.

Q. Yes. Mr. Zaleski, can you recall the assumed

(Testimony of Leo M. Zaleski.)

facts which I gave you in this last question? Perhaps I had better repeat them. Would you please give your opinion based upon the following assumed facts? Assume that a liberty vessel is anchored in a protective harbor where the water is smooth; further assume that the lighting provided is a cargo light and some sort of a floodlight which throws light on a Jacob's ladder which is there employed; that the light which it throws on the Jacob's ladder is somewhat dim and that no light is available on the liberty launch itself other than [15] that provided by the light from the liberty ship. Assume further that the time is approximately midnight. I will ask your opinion under those assumed facts whether or not a Jacob's ladder—a standard form of Jacob's ladder such as that which you have previously described is a safe means to afford the crew members ingress and egress to the vessel when returning from shore liberty or going ashore? A. Well, no.

Q. Your answer is "no"?

A. (Witness nods head.)

Q. Why do you say that?

A. Well, there are several reasons. A Jacob's ladder is—being flexible, they're not the easiest things to climb and anybody who has—unless they have done a lot of climbing on them can very easily get hurt or if they have packages in their hands, which most of them generally do, well, it's pretty difficult to climb up and you can't never tell about the lines securing it.

(Testimony of Leo M. Zaleski.)

The Court: Line security?

The Witness: Pardon?

The Court: Did you say the line?

The Witness: The securing—the line where they are secured onto the deck.

The Court: I see. That isn't at issue in this case, is it? [16]

Mr. Krause: Not that I know of.

The Court: There isn't any issue?

Mr. Williams: No.

The Court: The Court will disregard it.

Mr. Williams: I wish it would.

Q. Mr. Zaleski, where would a man who was climbing a Jacob's ladder if he was to, for some reason, become dislodged from the ladder, fall?

A. Well, he has got a pretty good chance of falling on the launch or into the water.

Q. Or on another crew member? A. Yes.

Q. Mr. Zaleski, what is a Jacob's ladder customarily employed for?

A. For pilots coming aboard and going ashore; sometimes for custom agents or the doctors, quarantine officers.

Q. Do one or more members of the ship's crew sometimes use the ladder for specific tasks ashore?

A. Well, sometimes they might go down onto the stagings by the Jacob's ladder.

Q. Do you mean to do some work on the vessel?

A. Yeah; on the ship's sides; painting the side of the ship. They might lower a Jacob's ladder to go down.

(Testimony of Leo M. Zaleski.)

Q. When the vessel is taking on oil is it sometimes necessary to use one for some purpose? [17]

A. Well, they can sometimes. Sometimes the oil barge will have a regular stepladder they will land up against the side of the ship.

Q. Does the use of the Jacob's ladder for certain specific purposes, is that sometimes required of certain of the members of the engine room of the vessel?

A. Well, outside of only the chief engineer going down to check on his oil that would be about the only time we would use one.

Q. To measure oil?

A. Yeah; check the soundings on the barge.

Q. Is there any purpose aboard the vessel whereby someone, a member of the steward's department would use the Jacob's ladder?

A. None that I would know of.

Q. Is a Jacob's ladder easy to climb or difficult to climb?

A. Well, they're kind of difficult. Some work a little better than the others, it depends on its age.

Q. Mr. Zaleski, does the work of a second assistant marine engineer aboard a vessel require heavy laborious work lifting and that sort of thing?

A. At times, yes.

Q. Then, it is your testimony it does not require it constantly, is that correct?

A. No. [18]

Q. Just occasionally?

A. (Witness nods head.)

(Testimony of Leo M. Zaleski.)

Q. Mr. Zaleski, when members of the crew are on shore leave, that is to say, they have left the ship or have not returned to it, who is in command of a liberty launch if one is provided for the convenience of the men going and coming ashore?

A. Nobody besides the skipper of the launch.

Q. You mean the person who owns the launch employed to run it? Is it your testimony that all of the men are of equal rank when they are on shore liberty? A. Yes.

Mr. Krause: Well, just a moment, your Honor. He hasn't so testified and I don't think counsel should lead him.

The Court: That is a perfect leading question.

Mr. Williams: I realize that. I withdraw the question.

Q. Mr. Zaleski, you have testified, have you not, that no one is in charge of such a liberty launch?

A. No.

Q. That was your testimony, wasn't it?

A. Uh huh.

Q. How many departments does a liberty ship have? A. Three.

Q. Are you referring to licensed or unlicensed?

A. Well, everything. Engines, stewards, and deck. [19]

Q. Engine, steward, and deck? A. Uh huh.

Q. They have licensed and unlicensed men in each of those departments?

A. All except the stewards.

Q. Beg your pardon?

(Testimony of Leo M. Zaleski.)

A. All except the stewards department.

Q. They have no licensed personnel?

A. No licensed personnel.

Q. Is there a department for radio men also?

A. Yeah.

Q. When a liberty launch returns with a crew to the side of a vessel is there someone in that launch or is there someone on the deck of the vessel in charge of the boarding of the vessel?

A. No.

Q. There is no one in charge?

A. (Witness shakes head.)

Q. What I mean, Mr. Zaleski, is there a sailor or someone else on so-called gangway watch when the liberty ship returns to the vessel?

A. Sometimes.

Q. Mr. Zaleski, do you know what the pay scale of a second assistant engineer is at the present time?

A. I believe it is \$506 a month. [20]

Q. And, do you know what overtime rate would be applicable to this overtime employment?

(At this time Mr. Krause objected, suggesting that the records available in the case would be the best evidence of the rates of pay.)

Q. (By Mr. Williams): Mr. Zaleski, when a Jacob's ladder is climbed where would you say the most hazardous point on the ladder is when you are going—ascending the ladder from a lighter or liberty launch to the vessel?

(At this time Mr. Krause objected.)

(Testimony of Leo M. Zaleski.)

Q. (By Mr. Williams): Well, I will ask you, Mr. Zaleski, what does a seaman do when he climbs a ladder—a Jacob's ladder going from a liberty launch to the deck of a vessel?

A. Oh, well—what do you mean by "What does he do"?

Q. What action does he take? Describe his ascent up the ladder.

A. Well, some of them when they go they use the sides.

Q. To hold on to?

A. Yeah. They use the sides of the ladder.

Q. Yes. A. Others use the rungs.

Q. Yes. To hold on to?

A. To hold on to, to pull themselves up as they—

Q. What happens when they get to the top?

A. Well, sometimes you get a problem. You will have to reach around over the gunwale and then pull yourself the last couple of steps.

Q. But, the ladder is hooked over the rail?

A. Yeah.

Q. And, you are getting off there?

A. You ain't got nothing to hold on to.

Q. You don't have anything to hold on to, is that—

A. No; just the rail.

Q. Yes.

A. You would almost have to leapfrog over.

Q. Now, suppose that you were going to get off at some midway point on that ladder as, for example, if it were hooked up to the rail on the

(Testimony of Leo M. Zaleski.)

boat deck and you were going to get off on the main deck how would you get off on the main deck?

A. Well, you would have to step off, climb up to even to the rail and then step off over onto the rail.

Q. Step around the edge of the ladder?

A. Yes.

Q. Whereas a Jacob's ladder fastened — is it fastened at more than one point on the vessel, that is to say? A. Generally, no.

Q. Then, it hangs free from the point where it is fastened at the top? A. Uh huh. [22]

Mr. Williams: I believe that's all, your Honor.

The Court: Cross examination?

Cross Examination

Q. (By Mr. Krause): Mr. Zaleski, how long have you held your second engineer's license?

A. I don't have a second. I have a third.

Q. A third assistant? A. Assistant.

Q. How long have you held that?

A. It will be ten years in April.

Q. How much of that time have you served as a third assistant or as any licensed engineer?

A. Oh, approximately six years.

Q. A part of that time you were serving as a junior engineer who requires no license, is that right? A. No. No.

Q. You have held either a third assistant or better for about ten years; that is, you have had

(Testimony of Leo M. Zaleski.)

your license as a third assistant for ten years but you have served as a third assistant or higher?

A. Yes.

Q. Acting second for about six of the ten years?

A. Yes.

Q. When were you last at sea? [23]

A. Two weeks ago Friday.

Q. Are you now a member of a crew of a vessel?

A. No. I am relief engineer now.

Q. You are a relief engineer? A. Yes.

Q. A relief third assistant?

A. No; night engineer.

Q. Night engineer? A. Yeah.

Q. This last voyage was that a trans-Pacific voyage that you made? A. Yes, sir.

Q. The last voyage from which you returned about two weeks ago? A. Uh huh.

Q. Did you, while you were out this last time, anchor in any Japanese harbor, any foreign harbor over there? A. No.

Q. You were always at a dock? A. Yes.

Q. Have you at any time other than when you were on this Augustin Daly anchored in a harbor where the deck cargo was being discharged over the side? A. Yes.

Q. You have? [24]

A. (Witness nods head.)

Q. You have seen the Jacob's ladder used for getting aboard and off of a vessel when it is at anchor in a harbor, have you not? A. Yes.

Q. Aside from the crew members about how

(Testimony of Leo M. Zaleski.)

many longshoremen were boarding and leaving the ship each day?

A. Oh, I couldn't tell you. I don't know.

Q. You could give us no estimate of the number of longshoremen?

A. Oh, possibly twenty-five.

Q. Approximately twenty-five?

A. (Witness nods head.)

Q. They came aboard the ship by the Jacob's ladder too, didn't they?

A. Yes.

Q. They left again the same way?

A. (Witness nods head.)

Q. On the Augustin Daly this Jacob's ladder was the only method provided for getting on board and going off?

A. Yes.

Q. Now, Mr. Zaleski, do you have any straight-up-and-down ladders in the engine room of the vessel?

A. Two.

Q. Two of them. What are their heights approximately? [25]

A. Well, one of them is about seven feet and the other one is about fifty feet.

Q. One of them is seven or eight feet and the other is about fifty?

A. (Witness nods head.)

Q. Have you climbed them at times?

A. Yes.

Q. When your hands were covered with oil, greasy?

A. Yes.

Q. Are these steps usually covered with oil and greasy in the engine room?

A. Generally.

(Testimony of Leo M. Zaleski.)

Q. You climbed up and down those ladders, though, did you? A. Yes.

Q. Now, we will return to the pilot ladder. Is that at all comparable to this ladder in the engine room? A. Well, yes and no.

Q. In your opinion which is more dangerous to climb, the pilot ladder or this ladder in the engine room? A. The pilot ladder.

Q. The pilot ladder? A. Yes, sir.

Q. Although the pilot ladder has two rungs whereas your steel ladder in the engine room has one steel bar? A. No; we have two. [26]

Q. What? A. Two.

Q. You also have two steel bars? A. Yes.

Q. This pilot ladder whenever you used it was free of grease and dirt, wasn't it? A. Yes, sir.

Q. With the light there that you saw that night each step was perfectly visible, wasn't it, to a man on the ladder? A. I believe.

Q. That is, a man climbing the ladder could see every step as he stepped up to it? A. Yes.

Q. When you looked over the side you were able to see Mr. Farley lying on the deck of the launch about fifteen feet below, were you not?

A. Yes.

Q. You recognized him, didn't you?

A. Well, I couldn't recognize his features.

Q. You couldn't recognize his features?

A. No; but, build and——

Q. Now, I suppose before you ever went to sea

(Testimony of Leo M. Zaleski.)

you climbed up and down ladders, didn't you, Mr. Zaleski? A. Yes.

Q. Around the places on which you were, farms, [27] and so on, there were some straight-up-and-down ladders too, weren't there? A. Yes.

Q. You climbed them all right? A. Yes.

Q. Now, Mr. Zaleski, just tell us or, itemize for me now the reasons why a pilot ladder or Jacob's ladder is not safe. You mentioned one or two before. What is it, men would be coming back carrying packages when they went up? A. Yes.

Q. Do you carry packages up and down the Jacob's ladder when you are going up and down?

A. I have only climbed up a couple of them.

Q. You have only climbed up a couple of Jacob's ladders? A. Yes; with packages.

Q. Did you carry packages with you?

A. Yes.

Q. Did you ever carry a couple of bottles of whiskey at the same time? A. No.

Q. Have you also seen the men attach their packages to a heaving line when they go up the ladder instead of carrying them? A. Yes.

Q. You wouldn't say, I suppose, that having [28] your hands encumbered when you go up a ladder is a safe thing to do, would you?

A. No.

Q. Is that the reason that you say that a Jacob's ladder is unsafe because people sometimes have packages in their hands?

A. Well, for that and that it's not the easiest

(Testimony of Leo M. Zaleski.)

thing to hang on to in order to navigate going up because of its flexibility.

Q. Well, it would be easier for you to walk up a regular stairway than going up a ladder, wouldn't it? A. Yes.

Q. Does that make it safer to go up the stairway than the ladder? A. Yes.

Q. It does? A. (Witness nods head.)

Q. Because a man coming drunk and going up the stairway would probably not get hurt whereas if he was drunk and tried to go up that Jacob's ladder he might get hurt, is that the other reason? A. Yes.

Q. All right. Now, then, how was the Augustin Daly discharging her cargo on this night between the 5th and 6th of April, 1952? [29]

A. I believe she was discharging into the water.

Q. Discharging to what?

A. Into the water.

Q. Yes. She was discharging at the water. And, there were long pilings — creosoted pilings, were there not?

A. I believe so. There were some.

Q. Heavy bridge timber, do you recall them——

A. Yes.

Q. —that were on the deck?

A. (Witness nods head.)

Q. This cargo was all Army cargo, wasn't it?

A. Yes.

Q. They were discharging that over the side?

A. (Witness nods head.)

(Testimony of Leo M. Zaleski.)

Q. Now, when they are discharging piling and timbers into the water over the side do they have an accommodation ladder out while that is being done? A. Generally, yes.

Q. They generally do? A. Yes, sir.

Q. On the same side that they are putting the piling into the water? A. Yes.

Q. Yes. There is no danger of damaging the accommodation ladder when they are doing that, is there? A. A little but not much. [30]

Q. These pilings, were they being made up into rafts alongside the vessel? A. I believe so.

Q. Yes. And, the timbers were also being made up into rafts alongside the vessel, weren't they?

A. Yes.

The Court: I think this is a good place to interrupt.

Mr. Krause: Oh, yes, your Honor.

(Whereupon the Court recessed for the lunch hour.) [31]

(Court convened at 3:00 P.M., July 27, 1955, pursuant to adjournment.)

The Court: We had Mr. Zaleski on the stand, I believe.

(Whereupon, Mr. Zaleski resumed the stand as a witness.)

Cross Examination—(Continued)

Q. (By Mr. Krause): Mr. Zaleski, how many renewals of your license have you had? A. One.

Q. Well, then, they run for five years each time?

(Testimony of Leo M. Zaleski.)

A. Yes, sir.

Q. So, you are on your——

A. Second license.

Q. ——second license now? Has that nearly run its five-year term? A. Yes, sir.

Q. Do you recall the date of your license?

A. I believe it's April 26th. I have got it right here.

Q. You may look at it if you wish.

A. The 30th of April—no. 12th of April, 1951.

Q. Then, it has another year to run——

A. About——

Q. ——to make up your ten years on the license?

A. (Witness nods head.) [32]

Q. Was this voyage of the Augustin Daly the only one that you have made to ports where the vessel anchored out in the harbor?

A. I don't quite understand you.

Q. This one voyage of the Augustin Daly, was it the only one in which you were on a ship that anchored in the harbor to discharge cargo?

A. Oh, no.

Q. You have been on other ships that did that?

A. Yes, sir.

Q. Both before and since? A. Yes, sir.

Q. Were they discharging cargo over the side into the water too other than the—— A. Yes.

Q. Augustin Daly? A. Yes.

Q. Now, can you tell us what the duties of the engineer officers are outside of the immediate work of operating and keeping the engines in repair?

(Testimony of Leo M. Zaleski.)

A. Oh, that's about the limit of them. He has a certain amount of responsibility as far as the crew goes but it is limited to—well, extreme—well, emergencies or something like that. But, on the whole you do—after you have done your work that is as far as your responsibility goes. [33]

Q. Well, you are on duty four hours on and four hours off when you are at sea?

A. Eight hours off.

Q. Yes. Oh. Four hours on and eight hours off when you were at sea? A. Yes.

Q. So, outside of doing your work during those watch hours you have no duties? A. None.

Q. None? A. (Witness shakes head.)

Q. You have no responsibilities towards the safety of the ship, the cargo, or the members of the crew, when you are not on watch?

A. Well, everybody has that. That's—

Q. Well, now, you see, I asked you to give us the duties of the licensed officers of a ship, particularly the second assistant engineer. Now, what duties does he have towards this crew, toward the cargo, and toward the ship, other than standing his watches?

A. Well, none unless they are trying to damage the vessel or the cargo.

Q. Well, then, when you say “none unless they're trying to damage the cargo or the vessel”——

A. Yes. [34]

Q. When an engineer officer sees a member of the crew doing some negligent act that might result

(Testimony of Leo M. Zaleski.)

in the crew man's own injury the engineer officer has no duty? A. Legally, no.

Q. Well, you don't have to give us the law, Mr. Zaleski, now. As an officer of the ship do you consider that the officer has any duty with respect to a crew man who is doing a negligent act that is apt to injure him? A. To a certain degree.

Q. Well, what would the duty of the engineer be if he sees a member of the crew doing something that is plainly negligent and might result in that man's injury?

A. Well, if the person involved has any conscience, well, he might try to do something to stop him but if he doesn't you let him go and let him learn the hard way.

Q. All right. That is, then, the officer does not have a duty to try to prevent injury to a member of the crew?

A. No, I wouldn't say that he would be bound to it.

Q. Well, Mr. Zaleski, doesn't he either have a duty or he doesn't have a duty?

Mr. Williams: Your Honor, I wish to impose an objection to Mr. Krause's interrogation when he says "an officer" unless he refers to the type of officer. He has referred from time to time——

The Court: I think you are entitled to ask the witness. [35]

Mr. Williams: There is a vast difference between them.

Q. (By Mr. Krause): I thought I had referred

(Testimony of Leo M. Zaleski.)

to a second assistant engineer—— A. Uh huh.

Q. ——on the *Augustin Daly*? Do you, first of all, know what the duties of the second assistant engineer are? A. Yes.

Q. You do? A. Yes.

Q. All right. Now, then, does the second assistant engineer have a duty with respect to a crew man, a member of the crew of the vessel, to warn him when he is doing something negligent that might result in the man's injury? A. Yes.

Q. He does? Now, if this negligent crew man is doing something that might result in injury to others of the crew does he have the same duty to warn him?

A. Well, I wouldn't necessarily call it a duty, I would put it on the same basis that if you seen somebody running across the street in front of a car it wouldn't be necessarily your duty to warn him.

Q. All right. There is no duty in that case, you're right. A. Yes.

Q. Therefore, you would say that the second assistant has no duty towards his crew men either?

A. Yes.

Q. All right. Now, does the second assistant have a duty to protect the ship against injury outside of his watch? A. I believe so.

Q. You believe he does?

A. (Witness nods head.)

Q. He would have a duty to protect the ship against injury but not a member of the crew?

(Testimony of Leo M. Zaleski.)

A. No.

Q. Yes. Now, is there any rule aboard ship regarding standing under things that might fall down on you from above? A. No.

Q. There is no rule?

A. (Witness shakes head.)

Q. There is no rule not to stand out from under loads of cargo or things of that sort?

A. None that I know of.

Q. Is it the practice of men aboard the ship to stand under things that can fall on them?

A. Sometimes it's unavoidable.

Q. All right. Now, can you tell us whether there is any rule with respect to standing at the foot of a ladder while another man is climbing?

A. Well, there again it might be unavoidable.

Q. Well, my first question was is there any rule about [37] standing—— A. No.

Q. ——in the clear? A. No.

Q. You don't know of any such rule. Then, let me ask you whether or not that is a reasonably safe place for a man to be standing under a ladder while another man is climbing? A. Not necessarily.

Q. It is not necessarily safe or unsafe?

A. Well, it can be both.

Q. Well, don't you have any view on it at all, Mr. Zaleski, one way or the other?

A. Well, sure; it depends on the conditions.

Q. Well, you saw the conditions of this pilot ladder and the liberty boat, the lighting, and so forth, on the night that Mr. Farley was hurt?

(Testimony of Leo M. Zaleski.)

A. (Witness nods head.)

Q. Now, you know the ladder and all of the conditions, you saw them and you have described them to us. Now, will you tell us whether that is a reasonably safe place for a man to stand at the foot of a ladder under those conditions?

A. Well, I would say it was.

Q. It was?

A. In one respect that when you are going up them Jacob's ladders from a launch there is generally one man holds the [38] ladder for the other one to go up, keep it stabilized.

Q. Well—— A. And——

Q. Well, that didn't happen to be a part of this case, Mr. Zaleski, as far as I know. No one has claimed so far that Mr. Farley was holding the ladder for the man going up ahead of him and therefore you can leave that out.

A. Uh huh.

(At this point Mr. Williams made an objection and then withdrew it pursuant to the Court's explanation of the matter.)

Q. (By Mr. Krause): Assuming, then, Mr. Zaleski, that there wasn't any occasion for anyone to hold the ladder at the bottom what do you say as to whether that is a reasonably safe place for a man to stand, then, within four or five feet of the bottom of the ladder?

A. Well, I would say four or five feet away from it, yes.

Q. That is safe. How close could a person stand where it would not be safe then?

(Testimony of Leo M. Zaleski.)

A. Well, right up agin it.

Q. Right up agin it. When a man falls down from the ladder does he fall usually straight down or out from the ladder?

A. Well, now, I don't know. I have never seen a man fall off up there. [39]

Q. You don't know. All right. Now, I think you said in your direct testimony that when the men are coming back from shore it is usual that someone has been drinking? A. Yes.

Q. Did you testify to that?

A. (Witness nods head.)

Q. Yes. On this night when the men had been at liberty in Sasebo it was to be expected that when they returned that some of them would have been drinking, is that right? A. Yes.

Q. All right. Do the men also usually pick up some things that they are bringing back to the ship with them? A. Some of them.

Q. You testified to me carrying packages up the—— A. Uh huh.

Q. ——pilot ladder?

A. (Witness nods head.)

Q. Is that a common thing when they are returning from liberty under those circumstances?

A. Yes.

Q. They don't usually bring packages back?

A. Oh, they bring packages back but generally don't use the Jacob's ladder.

Q. Oh. But, they don't usually have to go up a Jacob's ladder? [40]

(Testimony of Leo M. Zaleski.)

A. No. They have a regular accommodation ladder or gangway.

Q. A gangway when the vessel is anchored out in the stream?

A. Well, that's what they call it, accommodation ladder or gangway.

Q. But, a gangway is something different than an accommodation ladder? A. Yeah.

Q. A gangway is used when you can land one end of it on the dock or on some other floating object.

A. Well, you can do that with the accommodation ladder too.

Q. That is, you can rest——

A. Yes, you can rest it if you're on the dock. You use your accommodation ladder and just set it right on the dock.

Q. All right. But, at any rate, a gangway is not used when you are lying out in the harbor, is that right? A. Well, yes.

Q. How would they use the gangway then?

A. Well, in the same way, they hook it on to your platform and hold the bottom end up with the lifeboat falls.

Q. Are ships equipped with that type of a gangway that you have seen?

A. Some are and some aren't. There are different types.

Q. Now, then, if you will assume that these men returning from shore that some of them would probably have been drinking and that some of them

(Testimony of Leo M. Zaleski.)

would be returning with packages, do [41] you still regard this position four or five feet from the base of the ladder a safe place to stand while another man is going up the ladder? A. Uh huh.

Q. You do? Mr. Zaleski, have you ever been warned by other officers on the ship when you were there to stand out from under a load? A. No.

Q. Of cargo? A. (Witness shakes head.)

Q. Or any other heavy weight that was being lifted? A. No.

Q. You never have been warned to stand out from under? A. No.

Q. Have you ever been warned to stand out from under a ladder when other men were going up the ladder? A. No.

Q. You signed the articles on this voyage, did you not? A. Yes.

Q. Did those articles have any provision regarding bring intoxicating liquors aboard the vessel?

A. I think all they say is about grog.

Q. I beg your pardon?

A. I think all they say is there will be no grog allowed aboard. [42]

Q. Well, is whiskey an intoxicating liquor, or grog? A. Technically, no.

Q. Technically it isn't? What is grog, technically?

A. Well, it's supposed to be spirits and sugar and water.

Q. Spirits. Is that alcohol? A. I guess.

Q. Sugar and water?

(Testimony of Leo M. Zaleski.)

A. I don't know, I never had any grog so I couldn't actually——

Q. Well, at any rate, when you are signing these articles it's your understanding that grog means what you have just told us now? A. Yeah.

Q. And, it doesn't refer to other intoxicating liquor?

A. Well, the word itself doesn't but that's kind of an unwritten law that it's not supposed to be brought aboard.

Q. Now, does the second assistant engineer have any duty to enforce that portion of the articles?

A. I don't believe so.

Q. Have you as third assistant engineer participated in searching crew's quarters for intoxicating liquors? A. No, sir.

Q. You have seen it done by other officers, though, have you?

A. I don't believe I have. I can't recall of any ship that [43] I have been on that they did shake it down for whiskey or beer or anything.

Q. You didn't see them searching the vessel for intoxicating liquor? A. No.

Q. As far as the second assistant engineer is concerned you would say the same thing that he had no obligation to—— A. Yes.

Q. ——see that the crew did not bring intoxicating liquor aboard? A. Yes.

Q. Mr. Zaleski, you understand that a ship owner or an operator of a ship has some obligations to protect the crew against injury, don't you?

(Testimony of Leo M. Zaleski.)

A. Yes.

Q. This vessel was owned by the United States so the United States couldn't be on the ship. Now, who of the officers of the ship had the obligation of seeing that the crew members were protected against injury?

A. Well, primarily I would say the captain.

Q. The captain?

A. Yes. In him would rest all the decisions for the men's welfare and safety and that and he would have to pass orders on down to his mates and so forth.

Q. As to what facilities used, you mean? [44]

A. Uh huh.

Q. Then, you say it was the captain's obligation to determine what sort of facilities were to be used for the crew to get on and off the ship? A. Yes.

Q. Yes. Now, outside of that, then, if any of the crew members are doing something negligent outside of the immediate men that are on the second assistant's watch would the captain be the only one that is to look after the safety of the men?

A. No; the deck officer on watch.

Q. The deck officer on watch? A. Uh huh.

Q. So, as to the men that were climbing this ladder, if any of them were doing something negligent that might result in their own injury or somebody else's injury, the only person, then, that had any obligation to look after that was the deck officer on watch? A. I believe so.

Q. Any second assistant engineer in the boat that

(Testimony of Leo M. Zaleski.)

was actually in a position to see it, he had no duty?

A. No, I don't think so.

Q. You don't think he had any duty?

A. (Witness shakes head.)

Mr. Krause: I think that's all.

The Court: Redirect? [45]

(At this point a discussion was had concerning the blueprint of a liberty vessel.)

Redirect Examination

Q. (By Mr. Williams): First, I would like to have the log handed to the witness, please. The rough log will do, Exhibit Number 7. Will you refer to date of Sunday, April 6, 1952?

A. April 6th?

Q. Yes. Do you find that? A. Yeah.

Q. Have you that page, Mr. Zaleski?

A. Uh huh.

Q. Can you tell me what the mean draft of the vessel is on that date? Do you find that?

A. Twenty-three feet, three-and-a-half inches.

The Court: I'm sorry, I couldn't hear.

The Witness: Twenty-three feet, three-and-a-half inches.

The Court: Twenty-three——

The Witness: Three and a half.

The Court: Thank you.

Q. (By Mr. Williams): Mr. Zaleski, will you refer to the date immediately preceding that, April 5th, and give us the same information, the mean draft of the vessel?

(Testimony of Leo M. Zaleski.)

A. Well, we got two of them. At eight A.M. it was [46] twenty-three feet, two inches; and at nine P.M. it was twenty-three feet, three-and-a-half inches.

Q. This is on Saturday, April 5th? A. Yes.

Q. Now, now that you know what the mean draft of the vessel is can you compute the amount of freeboard on that vessel from the blueprint which you have before you?

A. Yeah; but I got to have a pencil and paper.

(Whereupon the witness was furnished with pencil and paper.)

The Witness: Afraid I can't do it. She don't figure right.

Q. You are unable to do it?

A. No. From the prints here it don't seem to come out. It's supposed to be one-sixteenth to the foot and you got twenty-three foot draft.

Q. It would be twenty-three sixteenths, I presume?

A. Well, we almost got the decks awash.

Q. I beg your pardon?

A. To get a twenty-three foot draft on this thing here I almost got the decks awash.

Q. Are you certain your measurements are in the right place?

A. No. I am measuring in the right place.

Q. Well, if you are unable to do so I won't question you further concerning that. But, are you able to give the [47] distance from the chart of the

(Testimony of Leo M. Zaleski.)

so-called house section of the ship, bridge section, the width of it?

A. About seventy-four feet, seventy-five feet.

Q. Between seventy-four and seventy-five feet. That is the distance fore and aft on the house section of the ship?

A. Yes.

Q. Can you indicate to the Court what you are measuring there from the chart? Would you please do that? Will you hold it up so that the Court can see it?

A. From this point right here (indicating) which is the forward bulkhead of the house to the aft bulkhead of the house.

Q. Ahead of that point there are hatches, are there not, and cargo booms ahead of the house section?

A. Yes.

Q. And, astern of it there are cargo booms and hatches also, are there not?

A. Yes.

Q. And, is it possible to swing cargo over the house section of the ship? Is that done?

A. No.

Q. Then, it is swung out approximately parallel to where the booms or the hatches are, is that correct?

A. Yes.

Q. Now, where is the position on the ship, the recess that [48] you spoke of and platform for the accommodation ladder?

A. Well, that would be——

Q. Will you point it out so the Court can see it, Mr. Zaleski?

(Testimony of Leo M. Zaleski.)

A. Approximately here (indicating). Approximately here (indicating).

Q. Will you describe where you are indicating?

A. Well, it is——

Q. How far aft of the front bulkhead?

A. Oh, about ten feet.

Q. Aft of it?

A. Front bulkhead, forward bulkhead.

Q. And, that same recess is on either side of the ship both port and starboard for the accommodation ladder? A. Yes.

Q. Which way does the accommodation ladder go down? A. Towards the stern of the ship.

Q. Goes to the stern. In your opinion, Mr. Zaleski, would it be possible for cargo loads to drop on the accommodation ladder when it is rigged in that position?

A. Well, I have never seen it happen.

Q. Well, the cargo would not be directly overhead, would it? A. No.

Q. Would the same apply to the booms in the—aft of the house section? [49] A. Yes.

Q. The house section there is where either the Jacob's ladder or the accommodation ladder is customarily placed? A. Uh huh.

Q. In this case was the Jacob's ladder placed in that general area?

A. Yeah; it was just—as well as I can remember it was just forward of that recess for the accommodation ladder.

Q. Yes. Now, Mr. Zaleski, when an accommo-

(Testimony of Leo M. Zaleski.)

dation ladder is being used is it just as easy or more difficult to get over the rail of the ship than it is with a Jacob's ladder, that is? A. No.

Q. You arrive at the rail, what is the problem there? A. You have to climb up the rail.

Q. With which ladder?

A. With the accommodation ladder you don't have to.

Q. You don't have to climb over the rail?

A. No.

Q. What do you do?

A. Well, you got that door or gate.

Q. A door through the rail?

A. Yes; a section of it swings out.

Q. Is there also a platform there that you alight on before you go through this recess in the gate——

A. Yes, sir.

Q. ——to get to the deck? Mr. Zaleski, Mr. Krause asked you previously whether or not you thought that the straight-up-and-down ladders you have in your engine room are as safe or some question concerning the comparative safety of that type of ladder with a pilot ladder. And, if I am not incorrect I believe your testimony was that the pilot ladder was not as safe as the engine-room ladder, the straight-up-and-down one?

A. Yes, sir.

Q. Why do you say that?

A. Well, you got something solid to hang onto.

Q. What is the ladder material in the engine room? A. Steel.

(Testimony of Leo M. Zaleski.)

Q. It is a steel ladder?

A. (Witness nods head.)

Q. Rigid? A. Yes, sir.

Q. You use that type of ladder frequently in the engine room? A. Well, not frequently, no.

Q. Is that the regular means of getting in and getting out of the engine room? A. No.

Q. Do you use the ladder for specialized purposes? A. Yes. [51]

Q. What are they?

A. Well, you might have to get up in the boiler room fiddley to make some repairs for painting; and, some of the other ones, to get up on top of the settlers for sounding in the settlers.

Q. Mr. Zaleski, how is an accommodation ladder rigged when the draft of the vessel is such that the steps of the accommodation ladder would be inclined to be not flat but at an angle?

A. Well, they generally take a plank and nail cleats on it or other pieces of wood, maybe, a foot, fourteen inches apart and they lay them across the steps and then on the underside they also put another cleat so that the plank won't slide; keep it secure. And on that one section it happened to be laying straight out where the steps would be perpendicular, well, they put that plank across them then the other section they leave her hang down, form a kind of an L-shape at an angle.

Mr. Williams: Your Honor, do you feel that some assistance could be given this matter by the use of a blackboard by the witness to describe this?

(Testimony of Leo M. Zaleski.)

The Court: Does the Clerk have a large paper?

Mr. Williams: I believe he could perhaps indicate it on that blackboard right there.

The Court: Well, that doesn't become part [52] of the record. There is no way of putting the blackboard in evidence. What do propose to have the witness diagram?

Mr. Williams: I propose to have him show Your Honor the rigging of an accommodation ladder when the draft of the vessel is such that the steps might not be flat; in other words, that the draft were shallow.

As Mr. Krause mentioned in his opening statement, that is one of the things relied upon by the respondent. I wish to have him show and overcome the effect.

The Court: All right. I will permit it at this time.

Mr. Williams: May I advance beyond the counsel table for a minute?

The Court: Yes, you may.

Q. (By Mr. Williams): Mr. Zaleski, can you start by drawing a straight line indicating the rail of the vessel and then make a cut out on it which would be the entryway through the rail where the accommodation ladder platform would be? Then, from that——

(Whereupon the witness draws on the blackboard as requested.)

Q. (By Mr. Williams): Will you draw the water in there with a curvy line?

(Testimony of Leo M. Zaleski.)

(Whereupon the witness draws on the black-board as requested.)

Q. (By Mr. Williams): Mr. Zaleski, you're [53] indicating a two-section accommodation ladder by that drawing, are you not? A. Yes.

Q. And you are indicating that the upper section is more horizontal than the steps of the ladder call for? A. Yes.

Q. That is the section that you stated would be covered by the board with some cleats on it?

A. Yes.

Q. Have you often seen that done?

A. Yes.

Q. Then, the lower section has the steps at their normal angle? A. Yes.

Q. There would be two pieces of that ladder would have to be suspended in two places by block and tackle?

A. Here and here (indicating).

Q. There and there (indicating)?

A. Yes.

The Court: What does it take, about a 45-degree angle?

The Witness: Approximately that.

The Court: On the lateral side of the ladder to have a horizontal step?

The Witness: Yes.

Q. (By Mr. Williams): Would you also [54] indicate the handrail stanchions on the accommodation ladder that you have referred to?

(Testimony of Leo M. Zaleski.)

(Whereupon the witness draws on the blackboard as requested.)

Q. (By Mr. Williams): The stanchions that you have indicated there, how high are those, Mr. Zaleski?

A. Oh, three, three and a half feet (indicating).

Q. Three and a half feet. Do you know how high they were on this particular accommodation ladder aboard the *Augustin Daly*?

A. No, I am not—I can't recall.

Q. You don't know if they were more or less than that?

A. I don't remember. They may have been more, they may have been less.

Q. Yes.

A. Standard is about three and a half feet.

Q. About three and a half feet is the standard length.

You can resume the chair there.

Mr. Zaleski, I just have one further question at the board there. Would you indicate the position of the liberty launch with relationship to the accommodation ladder? What position does it take alongside the vessel there?

A. You mean as it is now?

Q. Yes, as you have that accommodation ladder drawn in.

(Witness draws on the blackboard). [55]

Q. (By Mr. Williams): Yes. Now, I take it with the Jacob's ladder the liberty launch is directly underneath the Jacob's ladder?

(Testimony of Leo M. Zaleski.)

A. Yes; about in here (indicating).

Q. Yes. Do all the men go up that ladder at the same time or do they go up singly as they do on a Jacob's ladder?

A. Oh, sometimes they go four or five at a time or maybe one or two.

Q. Is the ladder sufficiently strong to support the weight of as many men as want to go up?

A. Yes.

Q. But, they don't go up like they do on the Jacob's ladder? Not one at a time or anything like that?

A. No.

Q. That structure and the steps and all that is rigid that you are walking on, is it not?

A. Yes.

Q. Is it up against the side of the ship?

A. Not directly; swung out a little ways from the side of the ship.

Q. What distance would you say, a foot or more or less?

A. Approximately a foot.

Mr. Williams: Yes. A foot from the side of the vessel. That's all I have on that. Will you take the stand again?

Mr. Zaleski, on cross-examination Mr. [56] Krause asked you a question somewhat as follows: "And you have seen the Jacob's ladder used for getting aboard and off a vessel when it is at anchor in a harbor, have you not?" And I believe your answer was "yes." Will you describe the circumstances under which you have seen a Jacob's ladder employed?

A. Well, when——

(Testimony of Leo M. Zaleski.)

Q. And who used it?

A. Sometimes when the pilot comes aboard and, occasionally, a customs agent and, possibly, a doctor—and, the Japanese longshoremen use them but Americans won't—and the only time I have ever used it is when the ship was under way leaving Singapore. The ship left early and we were——

Q. Would you speak up a little bit, please, Mr. Zaleski?

A. Yes. We were—the ship was leaving Singapore a little early, earlier than it was supposed to, so we were chasing it in a launch and they had the Jacob's ladder over the side and we come up on it.

Q. Is the Jacob's ladder occasionally used for ship's business ashore, captain and various officers, for official business?

A. Sometimes, yes, if only one or two are going to go ashore.

Q. Yes. Have you seen it used for an entire crew for shore liberty other than this one instance at Sasebo?

A. I am not sure. I can't recall.

Q. Mr. Zaleski, after Mr. Farley's injury, the SS Augustin Daly stopped at various other ports in the Orient, did it not?

A. Yes.

Q. Did it, at times, anchor in the harbors of those various ports?

A. Yes.

Q. Was the Jacob's ladder thereafter used by the Augustin Daly for shore liberty?

A. I don't believe so but I am not positive. I don't think it was.

Q. Did you go ashore at most liberty ports?

(Testimony of Leo M. Zaleski.)

A. Yes, I think so.

Q. Most of them you did?

A. Yeah; all except Pusan and they wouldn't let us go there.

Q. Yes. Was Sasebo, Japan, the first port in which the Augustin Daly stopped after leaving the United States on its inter-Pacific voyage?

A. I believe so.

Mr. Williams: I have no further questions.

The Court: Any further questions, Mr. Krause?

Recross Examination

Q. (By Mr. Krause): Mr. Zaleski, how long were these pilings on deck that were being discharged off the Augustin Daly? [58]

A. I don't know.

Q. You don't know? A. No.

Q. The length of the piling wouldn't have anything to do with the use of the accommodation ladder, would it? A. I don't believe so, no.

Q. These pilings were rafted when they got down in the water, were they not?

A. I believe so.

Q. So, there had to be a raft floating alongside the ship to put them in? A. No.

Q. Well, how did they take care of these pilings?

A. Tied them together with lashings.

Q. They don't put them into a raft?

A. Well, they build them into a raft.

Q. The boom sticks around them?

A. Yes.

Q. In any event, you say that it doesn't make

(Testimony of Leo M. Zaleski.)

any difference how long they were as far as the use of the accommodation ladder was concerned?

A. No, I don't believe it has any.

Q. Now, what is it that holds this accommodation ladder rigid, as you described it?

A. Well, structure. [59]

Q. What? A. The structure it is built.

Q. What is it that holds it rigid?

A. Well, now, what do you mean "rigid"? In which way?

Q. You used the word "rigid," Mr. Zaleski. Now, you tell us what it means?

A. Well, for one thing the steps ain't moving out from underneath the area and she doesn't have a tendency to sway all around like your Jacob's ladder would.

Q. Your Jacob's ladder is resting against the steel side of the vessel and sways all around, does it?

A. When you ascend it, it does. It has a tendency to.

Q. As you are ascending? A. Yes.

Q. Now, what is holding the lower end of the accommodation ladder when it is in use?

A. Both falls.

Q. What are they made of? A. Rope.

Q. Are they rigid when you step on them?

A. Fairly so.

Q. All right. By "fairly so" you mean that the accommodation ladder sags with you some when you step on it, is that correct? A. No. [60]

(Testimony of Leo M. Zaleski.)

Q. It doesn't?

A. (Witness shakes head.)

Q. In addition to that, since it is hanging from a boat davit with a fall, in addition to sagging when you step on it it sways sideways too, doesn't it?

A. A little.

Q. Yes. And, tell us what you mean by rigid?

A. Well, I mean by the ladder itself it—parts of the ladder doesn't move.

Q. This ladder is attached at the upper end——

A. Yes.

Q. ——firmly to a platform, isn't it?

A. Yes.

Q. And that could be said to be rigid, the upper end? A. Yes.

Q. All right. Now, the lower ends are supported by rope falls? A. (Witness nods head.)

Q. They run through blocks?

A. (Witness nods head.)

Q. When you step on the accommodation ladder you certainly have to take the slack out of the ropes to begin with, don't you?

A. Well, them are pretty heavy ropes. I don't think a hundred and fifty pounds would take much slack out of them. [61]

Q. All right. In addition to that there is nothing to prevent the accommodation ladder from swaying from side to side except when it would hit the side of the ship, isn't that right? A. Yes.

Q. On the outer side there is nothing to hold it what you might call rigid, is that correct?

(Testimony of Leo M. Zaleski.)

A. Well, just the tension of the boat falls.

Q. Tension of the boat falls. Yes. On the diagram that you drew, Mr. Zaleski, does that show your liberty launch as being parallel to the steamer?

A. Yes.

Q. It shows it parallel to the steamer. How long was this launch that you saw there with Mr. Farley lying on it?

A. Oh, twenty-five feet, I would imagine.

Q. What was its beam? A. I don't know.

Q. Well, what would you estimate its beam to be, Mr. Zaleski?

A. Oh, approximately five feet.

Q. Twenty-five-foot vessel in length and a five-foot beam? A. (Witness nods head.)

Q. Now, you haven't attempted to draw this vessel in there with any regard to scale, have you?

A. No, sir.

Q. On that diagram? [62] A. No.

Q. How long is the accommodation ladder altogether?

A. Twenty to twenty-five feet, I imagine.

Q. So, if this vessel was also twenty-five feet long it should be as long as the accommodation ladder in the drawing, shouldn't it? A. Yes.

Q. Have you got the accommodation ladder resting on the ship in your drawing?

A. Yeah. The high part, top end, it is secured to the platform there.

Q. Well, I mean, the accommodation ladder, is that resting on this little launch drawn below?

(Testimony of Leo M. Zaleski.)

A. No.

Q. It is not? A. No.

Q. So, it is just supported by these falls of the—
the boat falls? A. Yes.

Mr. Krause: I think that's all.

Redirect Examination—(Continued)

Q. (By Mr. Williams): Mr. Zaleski, would you know what the approximate weight of the accommodation ladder is? A. No, I don't. [63]

Q. How is it moved from such position as it may be in over to the position where it is hooked up for use? Is that moved by hand?

A. No; with the falls.

Q. No. I mean, can a couple of men carry this accommodation ladder around? A. No.

Q. How is it moved?

A. Well, they generally use the winches.

Q. The overhead boom? A. Yes. Uh huh.

Q. Is the weight of the accommodation ladder itself, does it put a considerable tension on the ropes going up to the davits?

A. No, I wouldn't think so; not too much.

Q. Are those ropes slack when there is no one on the accommodation ladder or is it the weight of the ladder itself that holds it?

A. Well, it's enough to take up the slack but—and there is no strain on them.

Q. You have seen an accommodation ladder rigged for use, have you seen the operation whereby it is set up and put into place? A. Yes, sir.

(Testimony of Leo M. Zaleski.)

Q. If the accommodation ladder is not in the position that [64] you have indicated, if it's somewhere else on the ship, how long would it take to rig it up?

A. Well, if it was secured or over on the other side of the ship, if they only had the one and she was over on the other side and, say, she was on the starboard side and they wanted it on the port side it might take them, oh, possibly two hours, maybe.

Q. Yes?

A. All depends on what is in the way and how they do it. Sometimes they will just horse it over, take it apart and take the two sections apart and just horse it across the ship and put her back together.

Q. How long does it take to rig a Jacob's ladder down?

A. Oh, ten minutes.

Q. About ten minutes. What is necessary to be done?

A. Well, just throw it over the side and tie the ends on the ship.

Mr. Williams: No further questions.

Recross Examination—(Continued)

Q. (By Mr. Krause): Mr. Zaleski, I made a note to ask you this before. Generally speaking, until the vessel has come to anchor at her place where she is going to discharge cargo or to the dock, everybody that goes onto the vessel or leaves it does so by means of the pilot ladder, doesn't he? [65]

A. Not at all times, no.

(Testimony of Leo M. Zaleski.)

Q. Until the time that the vessel is at anchor or docked, don't they leave—— A. Oh, yeah.

Q. ——go aboard by the pilot ladder?

A. Well, not all the time.

Q. Well, what do they have out for them at other times? A. Accommodation ladder.

Q. An accommodation ladder. That has been rigged up while they were still at sea or when they were coming into the river? A. Yeah.

Q. They put it out while they're still at sea?

A. No, not while they're still at sea.

Q. Yes. Now, how do the health officials board a vessel coming from overseas here in our own rivers, in the Willamette River, in the Columbia River?

A. Jacob's ladder.

Q. By the Jacob's ladder. Those are the doctors of the Public Health Service that come aboard in that way, isn't that correct? A. Yes.

Q. And, the immigration officials, how do they come aboard? A. Jacob's ladder.

Mr. Krause: Same way. I think that's all. [66]

Mr. Williams: No further questions.

The Court: That's all, sir. You may step down.

Mr. Williams: Your Honor, I could start with Mr. Farley. His testimony will take quite some time.

The Court: Do you want to take a short recess?

Mr. Williams: Yes that would be fine, your Honor.

The Court: All right. We will take a ten-minute recess.

(Recess taken.)

JOHN FARLEY

produced as a witness in his own behalf, being first duly sworn by the Judge, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Williams): May I have your name, please? A. John Farley.

Q. Where do you reside, Mr. Farley?

A. Reedville, Oregon.

Q. Reedville, Oregon? A. Reedville.

Q. How long have you resided there?

A. Seventeen years.

Q. Are you the libelant in this case, Mr. Farley?

A. Yes, sir.

Q. Prior to your injury what was your occupation? [67] A. Marine engineer.

Q. What grade?

A. Second assistant, unlimited.

Q. That is the license that you hold from the Coast Guard? A. Yes, sir.

Q. Second assistant marine engineer, unlimited?

A. That's right.

Q. Unlimited horsepower? A. Yes, sir.

Q. How long have you gone to sea, Mr. Farley?

A. A little over thirty years.

Q. When did you start?

A. I started around 1922, I guess. It was around in that time. Sailed out of here in 1923. I know that's over thirty years ago.

Q. What did you first sail as?

A. Hold passer.

(Testimony of John Farley.)

Q. Beg your pardon? A. Hold passer.

Q. And from that what other position?

A. Wiper.

Q. Licensed——

A. Wiper, deck engineer, oiler, water tender, and then engineer.

Q. Yes. Did you move up through the various categories [68] of engineer also?

A. I went third and second but I just—I got the ticket right off the reel. Second assistant right off the reel.

Q. How long did you sail as a second assistant engineer? A. Since 1928.

Q. Yes.

Have you sailed as first assistant engineer?

A. I have sailed as first assistant engineer on the Francis W. Barker. That was put in during the war.

Q. Then, you were sailing on a temporary license. A. Temporary license.

Q. As first? A. As first assistant.

Q. Yes. During that period of time did you sail on one particular class of ship or several classes?

A. I sailed on several classes: the passenger boats and freighters, steam schooners.

Q. Since the war have you served on one particular class of ship more than others?

A. Yes, sir.

Q. What type is that? A. Liberty ship.

Q. Liberty ship. The Augustin Daly involved in this case is a liberty ship, is it not?

(Testimony of John Farley.)

A. That was a liberty ship. [69]

Q. Yes. You signed articles aboard the *Augustin Daly*?

A. Signed articles aboard the *Augustin Daly* about the 24th of February.

Q. Were you employed by the ship prior to that date?

A. Yes, sir.

Q. What?

A. I went on about the—I think it was around the 4th or the 2nd of February.

Q. You went on it?

A. I got the job, then went down there and they signed on.

Q. You signed the articles later on in February?

A. Yes, sir.

Q. When you left the United States will you describe your voyage when you first left Portland?

A. We left Portland and we went right—left out of here and went down the river and got in a collision and then came on back again and they fixed the ship up and then we proceeded out again and went to Sasebo.

Q. You left the second time early in March, was it, then?

A. I couldn't just say when it was in March. It was in March, I guess, but I don't know just what date.

Q. Do you recall approximately what date you arrived in Sasebo?

A. The 2nd of April.

Q. 2nd of April. When you arrived there was shore liberty [70] immediately given?

(Testimony of John Farley.)

A. Yes, sir.

Q. How long was the ship at Sasebo?

A. How long what?

Q. How long was the ship at Sasebo?

A. It was there the 6th—from the 2nd to the 6th—the morning of the 6th. It left Sunday morning around, ten, eleven o'clock. They said they was going to sail at that time, that's what I heard that night.

Q. I believe the log will show the Augustin Daly did sail on the 6th of April, 1952. That was the date you were injured, was it not?

A. That is right.

Q. From the date that shore liberty was first given until the date that you went ashore or until the date of your injury, did you go ashore during shore liberty?

A. No, sir. I only went ashore Saturday night.

Q. Just the time when you were injured?

A. I went over there and told the chief I was going to get a haircut and I went ashore. The launch comes back that leaves there at twelve o'clock and I went ashore and done a little shopping and bought some articles.

Q. Just a moment, Mr. Farley. We will get to that in just a moment. I think you are a little bit ahead of me. A. Yes. [71]

Q. But, that was the first time—this is the one and only time you went ashore at Sasebo?

A. Yes, sir.

Q. Was on the day that you were injured?

(Testimony of John Farley.)

A. Yes, sir.

Q. You went ashore on the—— A. 5th.

Q. ——5th at about what hour?

A. After chow around six o'clock at night.

Q. Six at night. And, you returned the next day shortly after midnight, was it? A. Yes, sir.

Q. Now, during the time that the ship was in the harbor in Sasebo was it discharging its deck cargo? A. Yes, sir.

Q. Did it discharge any other cargo out of the hold?

A. I don't know if they discharged any cargo out of the hold or not because I don't pay any attention to that.

Q. Yes. Your station is below deck, is it not?

A. Yes, sir.

Q. Do you know for those days, April 2nd, April 3rd, April 4th, April 5th, and April 6th, what type of appliance was used to provide ingress and egress for crew members going on shore leave?

A. They had the Jacob's ladder. [72]

Q. Is that also referred to as the pilot's ladder? Is that also referred to as the pilot's ladder?

A. The pilot comes up it too.

Q. Well, it is known by that name too, isn't it?

A. Jacob's ladder or pilot's ladder.

Q. Now, will you describe your actions when you left the ship to go on the liberty launch and what you did ashore?

A. I went ashore with Harry Morgan and we both——

(Testimony of John Farley.)

Q. Excuse me. Will you indicate the man's name and what his position was on the ship, please?

A. That was one of the oilers aboard the ship.

Q. Yes.

A. I went ashore with him and I told him I was going to get a haircut. And so he went across the street into a little cafe and he says, "I will be over there and I will meet you when you get your haircut." So, I went and got my haircut and went on over there where he was at. I went in there and I had a beer and we went on uptown and shopped around and I bought some trinkets and stuff to bring back to the ship with me. And when I got back to the little place in the — down from the wharf where they catch the motorboat—there is a little cafe there. Well, I was in that little cafe a year ago or before that and I was in there and I noticed the people was in there so I says, "Can I leave these packages in here?" And I went in there and I went out then [73] around the corner and I bought a couple of more kimonos. When I got finished buying them I come on in and got my stuff and I said, "Well," I says, "what time do we get the launch?" because it was around twelve o'clock then.

So, I got my stuff and I went down towards the launch and then got on the launch and then away we went.

Q. Was Mr. Harry Morgan with you from time to time during that evening?

(Testimony of John Farley.)

A. Yes; he was with me uptown. He was shopping too.

Q. Not continuously?

A. He was with me continuously right uptown right with me. And then he left me and went into a little place where he was at and I didn't want to go in there so I told him, I says, "I am going down to the cafe and I will put my stuff in there because I want to buy some more stuff." So, he went back into this little place where it was at right across the street from the barber shop. And, then I went back and put my stuff and went around the corner and bought me a couple of more kimonos and took them back to the ship. That was it.

Q. Was there any other man that was with you from time to time while you were ashore there?

A. No. Nobody.

Q. Well, do you know Mr. Richard Pattox?

A. Pattox? I met Pattox when he was in that little barroom when I went in there with my stuff. He was in there. [74]

Q. What position does Mr. Pattox hold aboard the ship?

A. A wiper.

Q. He is a wiper? A. A wiper.

Q. Both those men were in your general department aboard the Augustin Daly?

A. That's right.

Q. And approximately how many men came ashore in the liberty launch with you, Mr. Farley, to the best of your recollection?

A. Well, I would say maybe about eight or ten

(Testimony of John Farley.)

men went into the liberty launch going over and, coming back, there may have been about twelve or fifteen men coming back in the liberty launch.

Q. Now, approximately what time did the liberty launch leave the dock?

A. Six o'clock. Or, you mean over at Sasebo?

Q. Leave the dock?

A. Oh. It left the dock around twelve o'clock.

Q. Around twelve o'clock. Was there any scheduled time for its departure?

A. Twelve o'clock is when they are supposed to leave out of there.

Q. Had you been told?

A. Yeah; I was told.

Q. By someone aboard the ship that that was the time for [75] departure of the launch?

A. That's right.

Q. That was regular?

A. Regular twelve o'clock. It's a chartered launch and they just—so many times a day to leave over the dock. And, in the morning.

Q. At specific hours? A. That's right.

Q. Who ran the launch? A. What?

Q. Were they ship's personnel or someone else?

A. The Japs.

Q. They were Japanese? A. Japanese.

Q. How much of a crew did this liberty launch have on it, how many persons? Do you know?

A. Oh. On the Augustin Daly?

Q. No; on the liberty launch? Was there more

(Testimony of John Farley.)

than one Japanese person running the liberty launch?

A. That's about all, I think, is just the one.

Q. Just the pilot?

A. Just the man driving it over, yes.

Q. And approximately how long did it take to go from the liberty launch—from the ship to shore, or return?

A. Takes about an hour, three quarters of an hour. About [76] an hour. I would say about an hour or close to it, anyway.

Q. Yes. Are there heavy tides in there or currents?

A. No, there is no currents in there because it is inside the breakwater.

Q. Yes?

A. See, it's set around a big hill and it's inside the hill, see?

Q. Yes. All right. Now, when you got in the liberty launch to return to the Augustin Daly you stated there were about twelve to fourteen men in there. Is that your testimony?

A. That's right.

Q. And do you know the names of any of the other members?

A. No, other than—well, all I know is just Pattox and Morgan. That's all I know. And, then, the big fat cook, I saw him there but I don't know his name or anything. And, I saw them other fellows in that barroom, them colored fellows in there, I saw

(Testimony of John Farley.)

them in there but I didn't—I didn't know their names at that time.

Q. Yes. Now, when you returned on your return voyage from shore to the ship where were you sitting on the liberty launch, if you recall?

A. I was back in the little—a little deck. They got a kind of a little hatch back on that liberty launch and I was settin' back there and I was talking to Morgan—

Q. Yes? [77]

A. —until we got—got up to the ship. I looked over and saw the ship there and he was pulling—he turned around and come on into the ship and I looked up and saw the ship and I just set there for awhile. And pretty soon he pulled alongside and when he did, why, I just took and got up and walked up and in between a little house—in between a little runway in between the cabin of the house where they steer at. I got—I walked in between that little aisle and then I stood there and wasn't there very long until—and I was just talking to Morgan when this man fell on me.

Q. Now, you said you were sitting aft in this little liberty launch on the way back. First of all, approximately how long was the liberty launch?

A. I'd say, oh, about twenty-five feet.

Q. About how wide? How much—what was the beam of it?

A. Oh, say eight or nine feet. Maybe eight feet, something like that.

(Testimony of John Farley.)

Q. What spaces did they have in this liberty launch for the passengers to sit?

A. Well, they got a little bit of a house in there but I didn't—I didn't look in there or nothing. They got a little place there maybe three or four fellows could go in there and sit if they wanted to if it was raining. The Japs sleep in there. Lot of them Japs sleep in there. I just went and set on the hatch, I didn't pay any attention to them. [78] But, they have little bits of cubbyholes where they sleep. They live on them, a lot of them do.

Q. On your voyage back do you recall any unusual activities and, if so, will you describe them with regard to other members returning with you?

A. I didn't pay any attention to see anything out of the ordinary at all. All I did was went aboard and the rest of them come aboard and that's all. I never heard no activities, any noise or anything.

Q. Did you hear any noise or boisterous activity?

A. No, I never heard nothing.

Q. Yes. Now, as the launch stopped alongside the Jacob's ladder where was the Jacob's ladder with relationship to the launch; that is to say, was it on the forward part of the launch, amidships, or aft, or where?

A. It was—I think it was about the forward end of the launch just right off this little housing, around in there right close in there because I was standing at the housing when this man fell on me. So, I judge it was just about forward of the house there.

(Testimony of John Farley.)

Q. Yes? A. Where the ladder was.

Q. When the launch stopped you said that you got up and walked forward. Did anyone else do that aboard the launch?

A. Well, it was Morgan and I just—I said, “Well, what [79] do you say we go up and get aboard?” So, we just got up and walked up there just slow.

Q. Did all the men on the launch get up about the same time?

A. Well, there was men forward and there was men all around on the launch but I just—I didn’t pay any attention to any of the other fellows at all.

Q. Yes. Now, did you observe any of the persons going up the Jacob’s ladder?

A. No, sir, I did not.

Q. You didn’t. And this point where you were standing you said was near this wheelhouse?

A. Yes, sir.

Q. Was it forward of the wheelhouse or back of it?

A. It was forward of the wheelhouse.

Q. Forward of it? A. Yes, sir.

Q. Approximately how far were you from the Jacob’s ladder where you were standing?

A. I would figure about five feet. That’s what I would just figure. I was just about five feet away from the ladder.

Q. Was the liberty launch right up against the Jacob’s ladder or was it out from it a little or what?

A. It could be out—it could be out a little ways

(Testimony of John Farley.)

from the Jacob's ladder because they reach right out and grab a hold of the ladder and pull it out towards them and get [80] on, I know that.

Q. Was the liberty launch fastened, tied to the ship in some manner? A. I don't know.

Q. Yes. Is there any place to tie—are there any cleats or eyes or anything down there for a liberty launch to fasten?

A. No, sir; unless they throw the line up above on deck and wait for—and wait for a certain hour to let the launch get out, or something like that. They could do that and hold it there while they're there.

Q. Now, Mr. Farley, as the liberty launch pulled in alongside the Augustin Daly, on which side of the Augustin Daly was it, port or starboard?

A. Port side.

Q. Was the launch facing the same way as the ship? A. Yes, sir.

Q. Did you look up on top of the ship?

A. I looked up. And when we was coming in I just looked up at the ship when we was coming in. I said, "There she is!"

Q. Did you observe any deck cargo up there?

A. No, sir.

Q. It had been unloaded? A. Yes, sir.

Q. Did you see anyone up there? [81]

A. No, sir. I didn't see anybody up there.

Q. Did you see anyone near the top of the Jacob's ladder?

A. No, sir. I didn't look up there.

(Testimony of John Farley.)

Q. Now, you have stated that you were standing at a point about five feet from the Jacob's ladder. Then what next occurred before you were hit, was there any activity, was there any noise, or what happened?

A. Well, I didn't know nothing, I will tell you. I never heard anything.

Q. Well, what were you doing there?

A. I was just standing talking to Morgan and Pattox was there and I was just talking to Morgan when the man fell on me. That's all I know.

Q. Did you hear anyone yell prior?

A. No, sir. I didn't hear nobody yell because I didn't hear nothing.

Q. Did you see anyone move prior to them?

A. No, sir.

Q. I mean, move rapidly on the deck of the liberty launch?

A. I didn't see anyone. I got hit and that's all I know.

Q. Yes. Were you rendered unconscious by that?

A. Well, I don't — I was — I suppose I was knocked unconscious all right because I don't remember much even when I got in the hospital. I got in the hospital that morning and I — that's all I know. [82]

Q. Were the men that were with you, were they struck, do you know?

A. Well, they told me later they were struck. I don't know a thing about it.

(Testimony of John Farley.)

Q. Well, we don't want—I will ask you to refer to page 6. No, not page 6, but April 6th of the rough log of the Augustin Daly.

(Whereupon the Crier furnished the witness with the document mentioned.)

The Witness: I got to get glasses.

Q. (By Mr. Williams): Sunday, April 6th.

A. Yeah, I got to get glasses now. I got my glasses at home.

Q. Oh, you don't have your glasses with you?

A. No, sir, I don't have my glasses with me.

Now, April 6th. Here is April the 6th.

Q. Do you note an entry on it, it would be the upper right-hand side of that page, relating to your injury?

A. Yes, sir.

Q. What does it say? Read it?

Wait, Mr. Farley. I believe counsel wishes to object.

Mr. Krause: Your Honor, that log is an exhibit. I don't think we have to have the witness read portions of the log into the record because they can be read by counsel [83] or the Court.

The Court: Yes.

Mr. Krause: And it isn't customary to have a witness read out of an exhibit.

The Court: Just call it to our attention, Mr. Williams.

Mr. Williams: I just wish to call to the Court's attention the data contained therein particularly relating to these other two men.

(Testimony of John Farley.)

The Court: Well, in the evidence, if you want to read it into the record, you may do so.

Mr. Williams: I would like to do it.

The Court: You may do so.

Mr. Williams: All right. I would like to do that now, your Honor, and to then remove this witness from the stand. He has just brought us up to the point of his injury. He will have substantially more testimony to relate. I have another witness here that I wish to put on for a very short time just to introduce one document.

The Court: Very well. Do you waive cross-examination?

Mr. Krause: We will reserve it until later.

The Court: Very well.

Mr. Williams: You may step down, Mr. Farley.

The entry reads as follows: "At anchor 0040, Sunday, April 6, 1952, at Sasebo, Japan, John Farley, second assistant engineer, suffered possible back injury and broken [84] ribs while aboard liberty launch waiting to come aboard when Malcolme Potts, assistant cook, fell from the pilot's ladder at main deck level approximately nineteen feet falling on Mr. Farley, Harry L. Morgan, oiler, and Richard Pattox, wiper. Mr. Farley was returned to shore by same boat for transfer to 8041 Station Hospital. Sent message via Naval Signal Station at Kobasaki to hospital requesting ambulance to meet launch." That is all I wish to read at this time, your Honor.

I would like to call Mr. Ralph Niles. Mr. Niles?

The Court: You may do so. [85]

RALPH H. NILES

produced at a witness on behalf of the libelant, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Williams): Your name is Ralph H. Niles? A. Yes.

Q. What is your occupation, Mr. Niles?

A. I am associate actuary at Standard Insurance Company.

Q. Here in Portland, Oregon? A. Yes.

Q. Do you reside in Portland, Oregon?

A. Outside; one of the suburbs.

Mr. Williams: Mr. Bailiff, would you please hand Exhibits numbered 11 and 12 to Mr. Niles?

(Whereupon the Crier did as requested.)

Q. (By Mr. Williams): Have you Exhibit 11 before you, Mr. Niles? A. Yes.

Q. What is that exhibit denominated U. S. Life Table, 1949-1951?

A. Actuarial tables based on United States Life Table.

Q. Is that eleven?

The Clerk: Ten is the one you want?

Mr. Williams: Ten is the one I wish the witness to [86] refer to first. I wanted ten and then eleven. I'm sorry.

Q. What is——

A. Number ten is the——

Q. Yes?

A. ——United States Life Table, 1949 to '51.

(Testimony of Ralph H. Niles.)

Q. Do you know what——

The Court: May I interrupt, please? Number ten is the United States Life Table, 1949 to '51.

Q. (By Mr. Williams): Who is the publisher of that document?

A. It is published by the United States Department of Health, Education, and Welfare, Public Health Service, National Office of Vital Statistics.

Q. What is the report based on as it states on it?

A. Well, the face on it just says "The vital statistics special reports, Life Table for 1949 to '51." But——

Q. Mr. Niles, do you use this document in your work commonly?

A. Not in connection with our life insurance work. We have it in our office for reference.

Q. I see. Now, will you please look at Exhibit Number 11? What is that?

A. This is the actuarial tables, based on United States Life Tables 1949 to '51.

Q. Who is the publisher of that?

A. That is published by the United States Department of Health, Education, and Welfare, Public Health Service, [87] National Office of Vital Statistics.

Q. Now, Mr. Niles, will you refer to the table therein which has actuarial statistics for American white males and do you find the age fifty-eight for American white males on one of the pages?

A. Yes.

(Testimony of Ralph H. Niles.)

Q. Now, going across the column to the left what is the last figure that appears opposite that age?

A. You mean to the right, don't you?

Q. Yes; to the right. Excuse me. I'm sorry.

A. United States white males in the last column shows the values of 8 sub X. You want the amount?

Q. Well, yes. What does it give for——

A. For age fifty-eight 13.3735.

Q. For age fifty-eight? A. Yes.

Q. 3735. Now——

Mr. Krause: What is that, money that you are talking about?

Mr. Williams: No, it isn't. He will explain what it says.

Mr. Krause: Well, this is an exhibit, your Honor. It is published by the Government. Now, I can read it, the Court can read it, counsel can read it into the record but I can't check this witness to see whether he is reading the [88] figures.

The Court: I understand that.

Mr. Williams: Your Honor, this is merely——

The Witness: I'm sorry. I was on the wrong page.

Mr. Williams: Oh, are you?

Mr. Krause: Now——

Mr. Williams: The witness is going to explain the use of it.

The Court: Just a moment. I'm awfully sorry, I'm not accustomed enough to the courtroom yet. I actually did not hear the witness and I'm going

(Testimony of Ralph H. Niles.)

to ask the Court Reporter to go back and read his last several questions for me.

(Whereupon the previous question beginning "Q. Now, Mr. Niles, will you refer to the table therein which has actuarial statistics . . ." and the following testimony up to the point of Mr. Krause's objection was read by the Court Reporter.)

The Court: Now, there is no particular reason for the witness reading into the record the document which has been received. And, I would suggest that since the documents have been identified that you now move their admission and then I can cross the bridge.

Mr. Williams: Oh, I regret that I haven't already done [89] that, Your Honor. I do move their admission into evidence.

The Court: Any objection?

Mr. Krause: We have no objection, Your Honor.

The Court: They will be received.

(Whereupon the documents identified by the witness as United States Life Tables previously marked for identification as Libellant's Exhibits 10 and 11 were thereupon received in evidence.)

The Court: Now, they may speak for themselves. If there is any explanation due you may ask the witness about it.

Mr. Williams: I feel there is, Your Honor. That's all I have been trying to get to.

The Court: All right.

Q. (By Mr. Williams): Now, again, Mr. Niles,

(Testimony of Ralph H. Niles.)

opposite the age fifty-eight for American white males what is the last—there is a figure in the last column to the right, is there not?

A. There is a series of tables for United States white males at various interest rates.

Q. Yes?

A. The most appropriate interest rate, in my opinion, would be 3 per cent and the last figure in it to the right opposite age fifty-eight and the 3-per-cent tables is 12.1358. [90]

Q. Now, will you tell the Court—well, first of all, is there a heading for that column and what is the heading?

A. The heading is A sub X.

Q. A sub X?

A. Yes.

Q. What does that mean? What does that column denote?

A. A indicates an annuity. It is a common notation in actuarial science to indicate an annuity. The X subscript indicates the age at which the annuity is to start. This represents a whole life annuity starting at the age shown in the left-hand column.

Q. Starting at age fifty-eight?

A. In this case, age fifty-eight.

Q. Now, what application is to be made of that figure? I mean, what does that mean?

A. That life annuity value represents a present value to a man aged fifty-eight of an income of one dollar per year payable as long as he shall live.

Q. That is not on life expectancy but for his lifetime?

A. For his lifetime no matter how long he lives.

(Testimony of Ralph H. Niles.)

Q. Then, if we were to assume that a man had an income, let's say, of a thousand dollars a year and he was aged fifty-eight; that is to say, to provide him with an income of a thousand dollars a year for his lifetime you would multiply one thousand times that figure? [91]

A. That is correct.

Q. The answer in that case would be \$12,135.80. I have no further questions.

The Court: Cross-examine?

Cross Examination

Q. (By Mr. Krause): Mr. Niles, what are these tables based upon, first of all, the United States Life Table?

A. They are based upon the 1950 census and the death statistics during the years 1949 to '51.

Q. That is the expectancy of life, then, is taken from the experience during two years, is that correct?

A. Well, during a period of three years: 1949 to and including '51.

Q. Oh. It includes 1949, 1950, and 1951?

A. That is right.

Q. That is the deaths occurring in that time?

A. Yes.

Q. They are used as the basis for determining what a person's expectancy of life is? A. Yes.

Q. That takes in all deaths at any rate and all people living at that time in the United States?

A. Yes.

(Testimony of Ralph H. Niles.)

Q. It has no relationship to occupation, does it?

A. No. It includes all occupations.

Q. All occupations from the least hazardous and exacting to the most hazardous and exhausting?

A. Yes.

Q. Does the line of work that a man has followed during his lifetime have any bearing upon his expectancy of life?

A. Yes.

Mr. Williams: Your Honor, I feel that isn't the question for this expert. That is not a proper cross-examination.

You are asking him a medical question, aren't you, not an actuarial one?

The Court: I misunderstood the question, then. May I have it again so I will be sure?

Mr. Krause: I thought it was an actuarial question.

(Last question and answer read by the Court Reporter.)

The Court: I think that is a matter of common knowledge.

Mr. Williams: I do too, your Honor, but nothing particularly for an expert.

Mr. Krause: Maybe I don't understand what is going on here, Your Honor. There were tables introduced here.

The Court: I wonder, Mr. Krause, if you don't have in mind what I thought you had in mind as to whether or not these tables take into consideration the occupation of the individual? [93]

Mr. Krause: Well, he said they didn't.

(Testimony of Ralph H. Niles.)

The Court: Well, that was what I understood and I thought that was just an extension of that remark.

Mr. Krause: Yes, that was.

The Court: I think that is competent inquiry so far as this testimony is concerned but I am inclined to agree with counsel that it is a well-known fact that occupations, whether hazardous or not, may be taken into consideration by any person in determining what the ultimate expectations might be. I think it is more an argument.

Mr. Krause: But, an actuary that sets up the—now, he read some figures or they were talking about figures upon which he is computing what a man would have to have to give him an annuity of so much for the balance of his years if he was fifty-eight at the time it was to start. Now, then, I wanted to inquire and to see just what factors go into this thing. I don't know anything about these U. S. tables and I assume that since Mr. Niles was an actuary with an insurance company that he would be the man. Otherwise, I don't understand why he was brought here because he doesn't know anything more about these tables than what we can read in them. I wanted to inquire from him just what the nature of the table is so we know how to apply them.

The Court: I think you certainly have that right, Mr. Krause. But, I am inclined to agree with [94] counsel that your last question doesn't go to that inquiry. I think your first one did.

(Testimony of Ralph H. Niles.)

Q. (By Mr. Krause): Now, the tables are separated for men and women, are they? A. Yes.

Q. That is male and female? A. Yes.

Q. As far as these U.S. Life Tables are concerned they have nothing to do with the insured's mortality? A. No.

Q. Beg your pardon? A. No.

Q. If those tables were based upon a longer period of time than three years, '49 to '51, it would be likely that different results would be obtained, would it not? A. Possibly.

Q. Well——

A. There are many factors that enter into the thing.

Q. If you took the years earlier than '49 the probabilities are that the expectancy would be lower? A. Yes.

Q. Is that correct? A. That is correct.

Q. If you took the years following 1952 the expectancy would probably be longer, isn't that correct? [95]

A. Yes, we would expect that. The mortality rate has been reducing and——

Q. Yes. The mortality rate is being reduced, yes. Now, when you say that the mortality rate is being reduced most of the increase in the average span of life is due to the prevention of disease and deaths of children?

Mr. Williams: Your Honor, I don't think this is an actuarial question and I will object. It is more in the realm of medicine.

(Testimony of Ralph H. Niles.)

The Court: I disagree with you. Those are all statistics which the actuary had to work with. He may get his information from a medical source but that is what he has to work with, how many people were born and how many people died.

Mr. Williams: I didn't understand that to be the question.

Q. (By Mr. Krause): Do you know the question, Mr. Niles?

A. Yes. In my opinion that was true up to, possibly, fifteen or twenty years ago, but at the present time there are improvements being made at the older ages which tend to increase the life expectancy at the older ages as well as at the younger ages.

Q. Well, both factors must now be taken into account, must they not? A. Yes.

Q. As children's diseases are eliminated that is a factor in determining expectancy? [96]

A. (Witness nods head.)

Q. As the diseases of old age are brought under control there may be some increase in expectancy there, is that generally correct?

A. Yes, that is correct. And, the statistics show that there has been improvement at the older ages.

Q. Yes. Now, what I would like to know under these United States Tables, when they have figured the expectancy of a man of fifty-eight in that period from '49 to '51 did they take only people at that age in order to determine that or is it based upon people at all ages?

A. It is based on the people at all ages.

(Testimony of Ralph H. Niles.)

Q. All ages?

A. All ages fifty-eight and over.

Q. There is no attempt being made to get the exact expectancy of life from people fifty-eight years of age?

A. There is no way of doing that based on a three-year period because they don't know how many people are aged fifty-eight. Now, how long they will live, how many of them will die at each age in the future——

Q. No. But of course, if you took all people aged fifty-eight twenty years ago you would come close to it, would you not?

A. If you took people fifty-eight twenty years ago they would be subject to the mortality that was experienced [97] during the previous twenty years. And, the mortality rate at the present time is lower than it was twenty years ago.

Q. Yes. But, we know how much it has been reduced to, don't we? A. Yes.

Q. We know how much the average length of life has been increased in those last twenty years, don't we? A. Yes.

Q. So that if you added that figure to it and took the age fifty-eight then you would have made allowance for the improvement generally?

A. If you were to do that you would arrive at a larger expectancy than would be shown by this table. This table is based on the mortality rates experienced during the three-year period, 1949 to '51. Mortality rates at each age, that is the rate of

(Testimony of Ralph H. Niles.)

mortality, number of people who died out of a thousand are determined at each age and based on those rates of mortality a life table is prepared. These annuity values which have been presented in evidence are based on the life table. That is based upon those mortality rates.

Q. Taking them age by age?

A. That is correct.

Q. Now, do those annuity tables—have they taken into account the cost of—well, we will say, doing business, investing money. [98]

A. No.

Q. In order to develop it?

A. They have taken into account only mortality rates and interest.

Q. They have taken into account mortality rate and a 3 per cent interest rate?

A. 3 per cent interest, yes.

Q. They are, then, not annuity tables that any insurance company has used?

A. No, they are not.

Q. Are there any figures that are used by actuaries based upon—well, any figures used that actuaries have that show the differences in expectancy of men in different occupations?

A. So far as I know there are no mortality tables prepared for different occupations. The insurance companies charge higher premiums for different occupations but they are not based upon mortality tables compiled for the separate occupations. So that the life expectancy would not be available for different occupations.

(Testimony of Ralph H. Niles.)

Q. But, generally, the insurance companies charge higher rates with respect to occupations that are regarded as more hazardous?

A. That is correct.

Q. Also, that people in that occupation have a lower expectancy? [99]

A. Yes, they are assumed to have a higher rate of mortality which automatically gives them a lower life expectancy.

Q. Now, is the work of an engineer going to sea a more hazardous occupation than occupations ashore?

A. I am not qualified to answer that.

Q. And you don't know——

A. I don't know.

Q. ——whether rates are adjusted?

A. There are tables available. I don't work with them. There are tables available at the office and I would have to refer to those tables before I would want to answer it.

Mr. Krause: Yes. I think that's all. Thank you, Mr. Niles.

Mr. Williams: Just one more question.

Redirect Examination

Q. (By Mr. Williams): Mr. Niles, these tables, besides being broken down as to males and females, are broken down between whites and non-whites, are they not? A. Yes.

Mr. Williams: That's all.

The Court: We will adjourn until ten o'clock tomorrow morning.

(Whereupon Court adjourned to be reconvened at 10:00 o'clock a.m. July 28, 1955.) [100]

Morning Session

(Whereupon the Court convened at 10:00 o'clock a.m., pursuant to adjournment.)

Mr. Williams: Call Captain M. D. McRae.

CAPTAIN M. D. McRAE

produced as a witness on behalf of the libelant, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Williams): May I have your name, please, for the record?

A. Captain M. D. McRae. M-c-R-a-e (spelling).

Q. Where do you reside, Captain?

A. At 2515 Northeast 9th.

Q. In Portland, Oregon?

A. Portland, Oregon. Right.

Q. How long have you resided in Portland?

A. In Portland?

Q. Yes? A. Ten years.

Q. What is your present employment, Captain?

A. I am Representative of the Masters, Mates and Pilots Local number 90.

Q. Is that group the masters, mates, and pilots, of this area—how big is it? [101]

A. Of the Portland area?

Q. Of Portland.

A. Including other ports of the State of Oregon.

Q. And how long have you held that position?

(Testimony of Captain M. D. McRae.)

A. I have been here for ten years.

Q. In that employment?

A. (Witness nods head.)

Q. Prior to that what was your occupation or following?

A. Well, I was going to sea prior to that.

Q. As what?

A. In any wheres from 1927 I had my master's license and I been in any capacity regarding officer's capacity aboard a ship since that time.

Q. In 1927 you had your ships' master license?

A. No, not the master's license.

Q. Oh? A. I had my first license.

Q. Your first mate's license?

A. That's right.

Q. You have been a Master for how long?

A. Yes. I been a Master for about ten years.

Q. About ten years. What class of vessels did you sail, all classes?

A. Well, mostly liberty ships after the war started. Before that there was some merchant marine. Those trans-marine boats. [102] They were built on the East Coast during World War I.

Q. Yes.

A. Then, of course, on all kinds of coastwise boats including the H. F. Alexander—all of those boats—for the Pacific Steamship Company—the old Pacific Steamship Company.

Q. Have your voyages taken you various points and places in the world?

(Testimony of Captain M. D. McRae.)

A. Yeah; most any place in the world, you might say.

Q. Have you made trans-Pacific voyages?

A. All around the world.

Q. Yes. Now, Captain, when a ship is in a harbor at anchor whose duty is it to determine what type—oh, first of all I will ask you who determines whether shore liberty shall be given?

A. The Master of the vessel.

Q. Yes. Who determines what appliances shall be used to enable the crew on shore liberty to leave the deck of the vessel and get to a liberty launch to go ashore and return?

A. That is the duty of the Master of the vessel too in the exception that he might be ashore then it is the first mate's duty.

Q. The first mate's duty in his absence?

A. Yeah.

Q. What duties do engineer officers of the [103] ship have with regard to that particular function?

A. Engineers have nothing to do with that particular function.

Q. They don't select the method or——

A. Definitely not.

Q. Yes. What is the duty of Engineers Department in general? The engineer office, what are they?

A. Their duty is in the engine room.

Q. To keep the ship in good——

A. To keep the ship and the engines going and to keep the engine room in condition, whether she is seaworthy. And also their duty is to take their

(Testimony of Captain M. D. McRae.)

orders from the bridge like any other of the crew. Their orders comes from the bridge.

Q. Does the second assistant engineer take his orders directly from you or through his chief or what?

A. He takes his orders from the chief engineer with the exception if he happens to be on watch and in charge of the engine room alone which at times the engineer is asleep he gets his orders direct from the bridge.

Q. Now, are engine-room officers, and that is to say, a chief engineer, first assistant engineer, or second assistant engineer, are they general officers of the ship?

A. Well, the term officer is something that has been handed down. In other words, why, on a merchant marine vessel the master of the ship, the first mate, the second mate, third mate, and fourth mate, their license, when they get it, are [104] marked that way; not second officer, first officer, third officer, or so on. Their license is marked First Mate, Second Mate, Third Mate; same with the engineers. On their license their licenses are not marked officer at all, their license is marked First Assistant Engineer, Second Assistant Engineer, Third Assistant Engineer. And, they have, of course—that's the way they are licensed. They have junior assistant, and so forth. But, in order to be a junior assistant, and so forth, you still got to carry a third mate's license. So, these are the licenses issued by

(Testimony of Captain M. D. McRae.)

the United States Coast Guard and that's the way they're written up.

On the articles that the ship is signed the articles are signed exactly the same way, not officer but First Mate, Second Mate, Third Mate, Fourth Mate. Same with the engineers, First Assistant, Second Assistant Engineer, Third Assistant Engineer, Junior Engineer, so on. They're not marked officer. The term officer is something that has carried on down from the old days.

Of course, naturally, we use it a lot. If somebody happens to come aboard and they ask for the second officer, why, that means the officer of the deck.

Q. Yes?

A. But, actually, when it comes down to it it's not officially.

Q. Yes. Who is the representative on the ship of the [105] ship owners?

A. The Master is sole representative of the ship owner aboard the vessel.

Q. Now, Captain, have you been in port numerous times over your career where the ship was anchored at anchor in a harbor? A. Yes, I have.

Q. Where shore liberty was given?

A. Yes, I have.

Q. You have ordered shore liberty for your men several times under those circumstances?

A. Yes, I have.

Q. What is a safe means to provide ingress and egress from the vessel to the liberty launch and return to the ship?

(Testimony of Captain M. D. McRae.)

A. Will you say that again? I didn't quite get you.

Q. What is a safe means by which to gain egress and ingress from the deck of the vessel down to a liberty launch and, of course, in returning from a liberty launch back up to the vessel?

A. It is the accommodation ladder.

Q. Is a so-called pilot's or Jacob's ladder a safe means to provide ingress and egress for a crew on shore liberty while a vessel is anchored at the harbor?

A. No. It is not considered a safe means for regular liberty crews going ashore. The accommodation ladder is there for that purpose and should be used at all times when [106] crew is going on shore liberty and coming back from shore liberty, not the Jacob's ladder.

Q. What is a Jacob's ladder customarily used for?

A. Well, it is customarily used for mostly in emergency, pilots coming aboard, and also where there is no crew liberty sometimes they use it if the ship is anchored for only a short time for the Master and the—whoever he might decide to take ashore with him to help him out in clearing the ship and entering the ship, but not as a rule. The Jacob's ladder is not used for shore liberty for the crew.

Q. Is a Jacob's ladder sometimes used for specific duties of certain members of the ship ashore?

(Testimony of Captain M. D. McRae.)

A. No—you mean taking certain members of the ship to——

Q. For example, say that only an engineer is required to go to shore to measure some bunkers, or something like that?

A. Well, he——

Q. Or taking on fuel?

A. If he—if the ship—if there was no shore liberty for the crew?

Q. Yes?

A. He would have to go ashore then in conjunction with somebody that the Master might order to go with him or get his orders from the Master to be able to do that.

Q. Yes?

A. He is not supposed to take it under himself to go [107] ashore when there is no shore liberty for the crew without getting permission from the Master or the chief engineer. He could get permission from the chief engineer but the chief engineer would have to get permission from the Master too. He is still under the Master.

Q. Captain, under those circumstances if just one or two men that you refer to were going ashore what appliance would be used then for——

A. Well, it all depends. If there was no shore liberty, if the Master didn't go ashore with him himself, he would send another mate ashore with him.

Q. Yes. What would they provide to get from the deck of the vessel down there?

A. Well, the proper thing would be to use the

(Testimony of Captain M. D. McRae.)

accommodation ladder but sometimes they did use the Jacob's ladder for just a couple of men or something like that——

Q. Yes.

A. ——where there was men with them to see that they did the right thing and came aboard the right way. And, as I say, we never let them go alone.

Q. Yes. Now, Captain, why do you say that an accommodation ladder is a safe method of getting—providing ingress and egress for shore liberty for a crew and that a Jacob's ladder is not safe? What are your reasons for that?

A. Well, naturally, the accommodation ladder is safer [108] because it's rigged.

Mr. Krause: Well, your Honor, I want to object to this because it is not a question of whether the accommodation ladder is safer because the ship owner is not obligated to furnish the safest method. The question is whether a pilot's ladder or accommodation ladder is not a safe method of getting aboard or leaving a vessel. And, the witness says that the accommodation ladder is safer and I move to strike that.

The Court: Yes, I think that is correct. That is purely a conclusion in the matter.

Mr. Williams: Your Honor, the deposition of certain officers of the ship have not yet been introduced in evidence, contend, however, that the Jacob's ladder is safer. I feel that at least at that time——

(Testimony of Captain M. D. McRae.)

The Court: You mean that is testimony on behalf of the defendant?

Mr. Williams: Yes.

The Court: All right. If that be true you are attempting to answer that.

Mr. Krause: Well, your Honor, may I say this that there was no judge to rule on the admissibility.

The Court: I understand that, Mr. Krause.

Mr. Krause: And, therefore, that evidence, if counsel objects to it, will not be before the Court later.

The Court: That's what I anticipated. That's the [109] reason I suggested that in any event this testimony would only be admissible in rebuttal.

Mr. Krause: I'm sorry.

Mr. Williams: I realize that.

Q. Captain McRae, you understand the Court's ruling on the point of objection raised by Mr. Krause? A. I do.

Q. That is, you are not required or asked to say which is really safer. But, my question was why do you say that an accommodation ladder is safe to provide shore liberty for a crew and a Jacob's ladder is not safe? That is my question. You don't need to state that one is safer than the other, just state your reasons for that.

A. The accommodation ladder, naturally, is the safe thing because that's—for years the accommodation ladder has been the connection between the ship and shore and the safest way for the crew to go ashore and come on board again, not the Jacob's

(Testimony of Captain M. D. McRae.)

ladder. If the Jacob's ladder was a safe—considered to be the safest way for men to come back on board the ship or to go ashore from the ship we wouldn't have to have an accommodation ladder there at all which is a very costly thing.

Q. You mean the accommodation ladder is?

A. Yes. It costs a lot of money to make an accommodation ladder and it don't cost very much to get a Jacob's ladder. [110]

Q. Does it cost more in terms of time in rigging an accommodation ladder over a Jacob's ladder?

A. Well, yes. Yes, it takes sometimes at least an hour and maybe a little bit more. But, most of the time before the ship arrives at port and we know we are coming in and going to anchor or are going to the dock we can do most of the rigging with the crew and have the accommodation ladder ready to lower away as soon as you get alongside the dock or get it anchored. It's on a bridle with a tackle hitched up to a davit on the boat deck and you get it all fixed up all ready. When you get to anchor or get to the dock you can lower it down and that's all.

Mr. Krause: Now, your Honor, I move to strike all of the Captain's testimony with respect to the comparison of the two ladders because all that I heard was that the accommodation ladder was safer than the pilot's ladder and nothing regarding the matters that counsel asked for in his question as to why the accommodation ladder was safe whereas the pilot ladder was not safe.

(Testimony of Captain M. D. McRae.)

The Court: Yes. I think the witness' statement in connection with the answer to counsel's question is merely a matter of argument and a description of rigging up the accommodation ladder. And, that's not the point of the inquiry.

Mr. Williams: Your Honor, the question to the witness— [111] the last question was does it take more time to rig one than the other and I think that is a perfectly proper thing to ask.

The Court: How is that material? It does not matter how much time it takes. The ship owner is responsible to get a safe place.

Mr. Williams: I think it would go to show that it is a practical device to be used which can always be shown in these employer liability cases if you show the existence of a good practicable device and it was not used it is permissible to show that in order that such a device existed and was not used.

The Court: Well, perhaps I misunderstand the Captain's testimony. His whole testimony was disparaging to the use of the accommodation ladder because it took longer and was more expensive, it cost more. If that is your intent to show that that is practicable, why, it seems to me that that essential is not the meaning of the Captain's testimony.

Mr. Williams: I wish it could be reread to the Court. I don't think that it carries——

The Court: I heard the testimony, Mr. Williams. Now, I think that what you are attempting to do is to anticipate the defense of the defendant in this cause. Now, the burden of your proof is that the

(Testimony of Captain M. D. McRae.)

Jacob's ladder which is admittedly used was not safe. That's your proposition in the case. [112] If then some other matter comes in on the defense you will be able to meet that in rebuttal. I think that is what you are attempting to do by asking these questions.

Q. (By Mr. Williams): Captain McRae, what reason do you have for saying that a Jacob's ladder is not a safe means of providing ingress and egress for crew members going to and returning from shore liberty without saying anything about this other device, the accommodation ladder and without discussing that for the moment? Can you give reasons why you consider the Jacob's ladder is not safe?

A. Well, under conditions which arise more so in the crew coming back aboard the ship, a Jacob's ladder is something that you have to have both hands and both feet to come up. In other words, why, if you—if you are not in a—coming up a Jacob's ladder holding on by one hand, or anything like that, you have got to use your both feet and both hands to come up a Jacob's ladder. And, you got to be—if you—if it is a long way down, nineteen, twenty feet, twenty-five feet, you just don't make that without having a little energy to do it. You got to be—watch every move you make coming up on a Jacob's ladder, especially. Going down it's not so bad. But, coming up a Jacob's ladder you got to hold on with both hands and with both feet. And, if it is a long way up there by the time you get

(Testimony of Captain M. D. McRae.)

to the top of the ladder if you're especially a heavy man or a little bit on the weak side, or [112-A] something, you get pretty well puffed up—puffed out by the time you get to the top of it. And, there should be a man there at the top of the Jacob's ladder to help you over the last few humps, over the humpy last minute.

Mr. Krause: I move to strike the latter testimony, your Honor, on the grounds it is not one of the issues in the case. There is no contention made that there should have been a man there to help anybody over the rail as far as anything I have discovered in the case so far.

Mr. Williams: I will have to disagree with that, your Honor.

The Court: Let counsel make his record.

Mr. Krause: Furthermore, it was not called for by the question itself and was not responsive.

The Court: It was a voluntary statement.

Mr. Williams: I will agree it was not responsive to the question but there is such an issue. An issue is made in the pre-trial order, your Honor, with regard to the matter that Mr. Krause objected to. I will read it in just a moment. It is Libelant's Contention Number 2f. "Respondent was negligent for having failed to supervise the boarding of said vessel by crew members ascending said pilot or Jacob's ladder while returning from shore liberty."

The Court: Well, we will cross that bridge when we get to it. The statement of the witness to the effect that [113] there should be a man at the rail

(Testimony of Captain M. D. McRae.)

to help him over the rail is stricken from the record because it is not responsive to the question.

Now, you can phrase your proper question when we get to that issue.

Mr. Williams: I will, your Honor.

Q. Captain McRae, is there any rule or practice with regard to a man being on deck watch, a sailor or an officer, when crew members are returning from shore liberty?

A. When a ship is at anchor there is a deck officer in charge at all times even at the dock, not alone at anchor. And, it certainly is the rule and the practice that when the boat leaves for shore—the liberty boat leaves for shore that the deck officer either be there himself or have a man assigned from the deck crew to be there at the time the liberty boat goes ashore. And, the same thing should happen when the liberty boat returns to take the crew back aboard the vessel, absolutely is their duty to be there and——

Q. Captain McRae, is it your testimony that when a man reaches the top of the Jacob's ladder and is just about ready to go over the rail, if he has climbed a long distance his energy is fairly well spent at that point, is that what you said?

A. That's right. I don't care whether—how—how good a man he may be he is going to get puffed by the time he gets to the top of that ladder if he has got to come up a [114] long way.

Q. If the ladder goes over the rail what does

(Testimony of Captain M. D. McRae.)

the man have to hold onto as he gets up to the top there?

A. He has practically got nothing to hold onto, only to reach over the gunwale and grab from the inside on the—it turns that way. There is an angle iron that turns, he can catch it inside on the angle iron to pull himself over the railing. Actually, the ships have a little ladder built about that—just about the height of the bulwark (demonstrating) with two or three steps on it and they set that on them for to step on to get down to the main deck.

Q. Get down?

A. Yes; get down to the main deck. But, he is not—sometimes they lash it and sometimes they don't. But, it should be lashed.

Q. Is it your opinion that a deck watch should be provided to assist men coming over the rail on the Jacob's ladder? A. Certainly.

Mr. Krause: Just a moment, Captain.

The Witness: Certainly.

Mr. Krause: The pleadings say "supervision," your Honor. Now, if there is going to be an issue I would like to be advised if it is an additional issue.

The Court: Can you answer counsel's query?

Mr. Krause: It seems to me this case has been under way [115] for a long time. We took six or eight depositions in this matter and the thing hasn't been mentioned up to this moment. And, we are not prepared to meet that particular issue unless it is now within the issues as they are framed.

(Testimony of Captain M. D. McRae.)

The Court: Do you claim that having a person on top of the ladder to actually physically assist and help any member of the crew climbing the ladder is covered by your contention of failing to supervise the boarding?

Mr. Williams: I feel that it does, your Honor. I have no other contention that covers the point more specifically than that.

The Court: Well, I think it is stretching the word supervise.

Mr. Williams: Your Honor, I can't hear.

The Court: I think it is stretching the meaning of the word supervise to hold that that includes actual physical assistance, particularly under the issue of—if it becomes a finding of helping a drunk man aboard. I just use that by way of analogy without finding it. The objection will be sustained.

Q. (By Mr. Williams): Captain McRae, when men climb the Jacob's ladder, do they normally climb it one at a time?

A. That is the correct way of doing it.

Q. Then, if a man is on the ladder he is there all by himself? [116]

A. That's right.

Q. There isn't another man behind helping him, or anything like that?

A. No. It would be very hard for a man behind to help anybody to climb up the Jacob's ladder.

Q. If a man were to fall from a Jacob's ladder, normally where would he end up?

A. Well, that depends. All the way—on account of the way he would fall. If he let go with his

(Testimony of Captain M. D. McRae.)

hands and went backwards, naturally, by the time he dropped down, hit the bottom wherever he might hit, he would be probably out five or six feet away from the side of the ship. But, this certain case, a man can fall another way. His feet can slip at the same time and let got with his hands and, naturally, he comes straight down.

Q. Yes. But, in any event, would he land in the water or where would he land?

A. Well, if the boat was close up against the side of the ship, naturally, he would land some place on the liberty launch.

Q. On the liberty launch?

A. But, if the liberty launch was away from the side of the ship a little bit he would probably go down in between, if he came straight down, and land in the water. That's something what you—it's under the conditions, which way would it happen.

Q. Yes. Captain, are you familiar with the duties of the second assistant engineer aboard the ship?

A. Yes, I am familiar with the duties.

Q. Do you know what his duties are when he is on shore liberty and is not aboard the ship?

A. Well, when he is on shore liberty and he is not aboard the ship he is a free man, he is on his own.

Q. It is your testimony he has no duties or responsibilities to the ship, then?

A. Not unless he is on watch and gone ashore for some duty for the Chief Engineer or the Master.

(Testimony of Captain M. D. McRae.)

But, if he is off duty and he is ashore on liberty he is his own boss.

Q. Suppose he is in a liberty launch returning to a vessel, does he have duties and responsibilities with regard to the other occupants of that liberty launch, assuming that they are all crew members?

A. That liberty launch is a launch chartered by the ship.

Q. I am assuming that it is not owned by the ship.

A. He is just a passenger like the rest of the crew.

Q. When the liberty launch gets back alongside the vessel and men start to climb up it, does a second assistant engineer—have his duties commenced yet with regard to the ship?

A. No. He has no duty at all until he gets aboard the vessel and then he has no duties as long as he is off watch or unless he is directed by the Chief Engineer or the Master. [118]

Q. Yes. Does he have duties, generally, with regard to other members of the vessel that are not in the engine room?

A. No. That is the Master's duty.

Q. The deck watch, as you have stated, Captain, that should be provided when men return from shore liberty, what is the purpose of the deck watch?

A. Well, the mate that is on watch, he observes everybody to see that everything is safe and everything is taken care of. In actuality he is there for the safety of the ship. That's why they keep a deck

(Testimony of Captain M. D. McRae.)

officer on watch at all times especially when the ship is at anchor. It's always the case of the ship draggin' or anchor draggin' and the ship moving about, or something, and especially if they're loadin' cargo there isn't any doubt that there has got to be an officer out on the deck on duty when they're discharging cargo. Maybe two of them if they're working four or five holds or working more than that. And, there is no ship of any kind under the American flag that goes to anchor that don't keep a deck watch. And it's his duty to see that everything is in shipshape order and see that nothing happens while he is on watch.

The Court: May I interrupt, please, Captain?

The Witness: Certainly.

Mr. Williams: Yes.

The Court: By way of analogy, would it be safe to say [119] that your deck officer is security officer of the ship?

The Witness: Well, in one way you might call him a security officer and in another way he is the regular ship's officer at the same time. You could call him a security officer but we don't generally call him security officer.

The Court: His duty is to protect the ship?

The Witness: He is there and that's what we have him there for.

The Court: And, if, for example, there was violence on the ship would he have authority to cause an arrest if he had to?

The Witness: Sure. He certainly would.

(Testimony of Captain M. D. McRae.)

The Court: If violence was being committed, not damage to the ship, but violence between crew members such as a fight between crew members, would the second or third assistant engineer have any authority by reason of his office?

The Witness: No, not unless ordered by the deck officer.

The Court: All right. Thank you.

Q. (By Mr. Williams): Is it also a duty of the deck officer to prevent the bringing of unauthorized persons or cargo aboard the ship?

A. It certainly is. That's what he is there for.

Q. Captain, is it, in your experience, a usual and customary thing that men returning from liberty have had something to drink? [120]

A. Well, I will answer that: you know seamen. From years and years that's—they been to sea for a month and they go ashore and generally always the rule if they're not half lit up they're all lit up when they come aboard the vessel. That's the principal time he should be careful—a man coming aboard the ship during the time the crew comes back from shore liberty. You know the history of sailors as well as I do. I don't have to tell you, just the history of sailors.

Q. Well, Captain, as you say, is it a usual and customary thing men returning from shore liberty in foreign ports often bring back packages with them?

A. That is correct, yes.

Q. Souvenirs and various things of that nature?

A. Yes. They have lots of things coming back.

(Testimony of Captain M. D. McRae.)

Souvenirs and what have you. Some of them as big as——

The Court: Is there any testimony here in issue that this man was carrying packages other than the two bottles of whisky?

Mr. Williams: That is a little unclear, your Honor. The man who fell says he was carrying two bottles, another deposition indicates that he doesn't know. They may have been just packages.

The Court: All right.

Mr. Krause: Your Honor, there is a good deal of testimony that there were a lot of packages among the men on the [121] ship. That's in the depositions.

The Court: All right.

Mr. Krause: Other packages than whisky.

Q. (By Mr. Williams): Captain, you have mentioned how a seaman or a crew man would get off the Jacob's ladder when he went over the rail and the ladder was fixed over the rail?

A. (Witness nods head.)

Q. Now, suppose the ladder was tied up on the boat deck and the seaman desired to get off on the main-deck level. How would he do so?

A. Well, he would climb the bosun ladder to the top of the—of the gunwale——

Q. Yes?

A. ——and then he would work himself in between the boat deck and the gunwale which there is an opening in there big enough—plenty big for a man to get through. But, there would be a—lot

(Testimony of Captain M. D. McRae.)

harder to get in through that way than to come over the gunwale.

Q. It would be harder to do that? A. Yes.

Q. Get off at the main-deck level?

A. Because you have got then to reach up on top before you can get a hold of—through this to hold on, come down in. There is an opening through the stanchions which is plenty [122] big to get through but you have got to have something up on top to hold on to drop down to the main deck.

Q. Would a man have to be in a crouch to get through that opening? In other words, could he stand up on top of the railing and not hit his head on the boat deck?

A. No. Oh, no, he couldn't do that. He would have to—he would have to—I wouldn't exactly say crawl in there but he would have to bend down a little to come in through there. He wouldn't have to crawl through it. He couldn't stand up there by any means.

Q. Yes. Captain, what do you consider a safe method to use for crew members returning from shore liberty? A. Accommodation ladder.

Q. Well, no. Just a moment. I hadn't finished, Captain. A. Oh.

Q. If a Jacob's ladder is to be—is to be used, assume that that's going to be used, how would you conduct that operation in safety? The men returning back in the liberty launch, how would you get them safely aboard?

A. You mean as far as the time of coming

(Testimony of Captain M. D. McRae.)

aboard the—or setting up the Jacob's ladder from the launch until they arrive aboard the ship?

Q. Yes. Would you use any special precautions?

A. Under certain conditions, yes. Special—it depends on the weather and the sea quite a bit. Now, a little boat [123] like that or liberty boat, if the sea is running quite heavy——

Mr. Krause: Well, your Honor, the facts are that it was smooth. Now, do we have to consider all those other angles too?

Q. (By Mr. Williams): Well, assume——

The Court: Yes, I think——

Mr. Krause: Their testimony was that it was smooth.

Q. (By Mr. Williams): We will assume that the water there—the ship is in a protected harbor and perfectly smooth.

A. Perfectly smooth?

Q. Yes?

A. O.K. Well, the man comes up the bosun's ladder just like climbing any other ladder. He comes up hand-by-hand, foot-by-foot, and step-by-step until he gets to the top, ordinarily, one man at a time coming up the ladder.

Q. Well, how would you see that those rules as far as one man at a time are carried out?

A. That is the deck officer's of the vessel—that's what I say, he should be there and see that that's done.

Mr. Krause: Your Honor, may I move to strike that on the ground that there is no charge here that two men were going up at the same time? There

(Testimony of Captain M. D. McRae.)

was one man going up and that's all. That's the charge and that's all the evidence is so far too.

Mr. Williams: Well, I don't believe his testimony covers [124] that. He just simply described certain safety precautions which should be followed and I asked him how they should be carried out and he said by the deck officer.

The Court: Let me have the question and answer, please.

(Last question and answer read by the Court Reporter.)

Mr. Williams: I will——

The Court: Is it your contention that there was more than one man going up?

Mr. Williams: No, sir. I will concede counsel's objection.

The Court: The objection to the question is sustained and the answer is stricken from the record and I will disregard it.

Q. (By Mr. Williams): Captain McRae, is it a safe thing for a man climbing the Jacob's ladder to carry packages so that both hands are not free?

A. Certainly not. Absolutely not.

Q. How would you see that that rule was carried out as men came aboard the ship from shore liberty?

A. That, again, comes down to the man that is supervising the crew coming aboard.

Q. That is what man?

A. The deck officer.

Q. Or his designated—— [125]

(Testimony of Captain M. D. McRae.)

A. Or he would designate a representative which would be one of the deck crew, an AB or ordinary seaman, or whatever they might be, or the watchman. Some ships carry a watchman.

Mr. Williams: That's all.

The Court: Cross-examine.

Cross Examination

Q. (By Mr. Krause): This deck officer, then, or whoever is up there is to lean over the rail and see what each man is doing as he comes up?

A. That is correct.

Q. That is what he has to do?

A. Yes, if he can't see any otherwise.

Q. Well, how would he see him?

A. Well, if he is tall enough he could see over the rail without bending over but if he is a short man he would have to bend over to see.

Q. All right. And, he has to stand there and see whether any man is carrying a package while he is coming up the ladder?

A. If he couldn't his eyesight would be awful bad.

Q. What?

A. His eyesight would be awful bad if he wouldn't.

Q. Well, all right. That's your testimony that he should be there to do that? [126]

A. That's right.

Q. Did you ever do that yourself when there was a liberty party coming back aboard ship?

(Testimony of Captain M. D. McRae.)

A. I certainly did.

Q. Oh, you did? A. (Witness nods head.)

Q. What is the date of your license, Captain?

A. The date of my license?

Q. Yes.

A. My license is renewed every five years.

Q. Well, the date of the last one?

A. The date of the last one? 11th day of December, 1951.

Q. 1951? A. Right.

Q. Your Master's license was first issued to you in what year?

A. This is the fourth issue of the Master's license.

Q. Fourth issue?

A. Five year every year—five year every issue, I mean.

Q. Yes. Now, how long did you sail as a Master, Captain? A. Ten years.

Q. Ten years? A. Uh huh.

Q. And you last sailed as a Master in about 1946, is that right? '45? [127]

A. '45. Summer of—spring of '45.

Q. What type of vessels were you on during the war, Captain? A. Liberty.

Q. Liberty? A. (Witness nods head.)

Q. Were you mostly out in the Pacific?

A. No. No. I was all over the world.

Q. You were where? A. All over the world.

Q. All over the world?

A. Australia, Mediterranean, India; any place

(Testimony of Captain M. D. McRae.)

you can mention with the exception of the British Isles. I wasn't to the British Isles.

Q. Your last time at sea, under what rating did you sail when you were last at sea?

A. Master.

Q. As Master? A. (Witness nods head.)

Q. Now, Captain, your familiarity with the duties of members of the crew and the officers, particularly, is based upon your experience at sea, I suppose?

A. Not exactly. It's based upon my examination from a Master's license.

Q. You were examined at that time with respect to the obligations of the various officers, were you? [128] A. I certainly was.

Q. When you took your Master's license you were examined with respect to the obligations of the engineer officers?

A. I was examined for the duties of an engineer officer, not—

Q. As to the duties of an engineer officer?

A. Absolutely.

Q. I noticed that while you were so specific at the outset in saying that these men were not officers properly you have been using the term officers yourself all through your testimony.

A. That is correct. As I say, it's something like you call more so to—it's a nickname aboard the ship now. It's been handed down from year to year. But, where it started from I do not know. But, actually, on the articles and on the license it don't say officer.

(Testimony of Captain M. D. McRae.)

Q. In all of the contracts between these unions and the employers association they refer to licensed officers associations, don't they?

A. Licensed—our name of our organization is the Masters, Mates & Pilots. Not Masters, Officers & Pilots but Masters, Mates & Pilots.

Q. My question is whether the mates and engineers were not always referred to in these agreements as licensed officers? [129]

A. They might be referred to under that—under certain conditions but in the final analysis of what the men are aboard the ships they're given their proper name. It is mates and engineers.

Q. All right. Now, what difference does it make whether you call them officers or mates and engineers, Captain?

A. Well, if you went up to get your license and you ask the United States Coast Guard inspector to put Chief Officer on your license instead of Chief Mate he would laugh at you.

Q. Do you consider because of that distinction that you are making that that affects the officers' or the engineers' duties and obligations?

A. Will you state that question again?

Q. Well, did you shy away from the term officer in order to minimize the obligations that the engineer—

Mr. Williams: That is objected to as argumentative.

The Court: Well, counsel has assumed some-

(Testimony of Captain M. D. McRae.)

thing by way of—oh, this is cross-examination. He may proceed.

Q. (By Mr. Krause): Is that still too vague, Captain?

A. I just didn't get it exactly what you meant.

Q. Tell me why you told us the difference between—why there was anything wrong about calling them officers. Why was that?

A. I didn't say there was anything wrong with calling them an officer. You can call them what you like. But I said [130] what the term—the term of the men in the licensed department aboard the ship—I said what their license calls for and what the articles they sign calls for. You can call them any name you want to.

Q. And you don't consider that either term has any effect upon their obligations and duties whether you call them officer or mate?

A. Just because you might call a horse a mule don't change his occupation, does it?

Q. Well, I'm sorry. I haven't yet found out why you said that. But, nevertheless, do the mates and the engineers as well as the Captain have any obligation for the protection of ship, cargo, and crew?

A. Engineers has got no obligation as far as the ship's cargo is concerned. They have an obligation for the crew when they're on duty and in the engine room when the engine room crew is off duty and in their rooms. On deck they come under the Master

(Testimony of Captain M. D. McRae.)

and whoever is in charge of the deck if any trouble comes up.

Q. Well, to be more specific, if an engineer officer, particularly the second assistant, sees a member of the steward's department doing something dangerous that might result in injury to that member of the steward's department does the second assistant engineer have any duty to warn him? [131]

A. Well, he has a duty as a man standing by seeing another man that is going to get injured to stop it. But, it's not his duty to break into anything unless it becomes dangerous. His duty then first of all is to notify the deck man that's in charge of the deck or the Master and then if the Master can't take care of it alone he can deputize anybody on the ship to help him.

Q. Well, my question was rather confined to whether the second assistant engineer had a duty to warn the man right while he is doing this negligent act?

A. Duty only as a human being, I would say, that a man wasn't gettin' beat up or killed.

Q. All right. Well, then, as far as being second assistant engineer is concerned he has no duty to warn the man against his negligence that might produce an injury?

A. Not unless he is in the engine room on watch.

Q. I am talking about the case where he is not on watch?

A. That's right. He has no special duty. No, he has not.

(Testimony of Captain M. D. McRae.)

Q. All right. And, if he saw this member of the stewards department doing something that was endangering the safety of the ship does he have a duty to warn him and stop him from doing that?

A. He has no duty outside of like I said just like a human being seeing somebody going—putting themselves in danger or endangering another man. But, he has no official duty. [132]

Q. All right. He has no duty to protect the ship against injury or loss, then, if he sees some member of the stewards department while this engineer officer is off watch to warn him against doing that thing that might cause the loss of the ship?

A. As a member of the crew he is supposed to report anything to the man that is in charge to take care of those instances. But, as I stated in the first place, if it comes to a dangerous point, well, naturally, the man should step in if anybody—he sees anybody that's going to get hurt or going to—and help him from gettin' hurt if he can. But, he has got no official duty when he is off watch and except he is in the engine room.

Q. Now, you said that climbing a pilot's ladder with hands encumbered was a dangerous thing?

A. Absolutely a dangerous thing.

Q. Then, is it a safe thing to stand under such a ladder while a man is going up in that way?

Mr. Williams: Object to that question unless he specifies some knowledge on the part of the person who was standing under. I feel that's too general.

(Testimony of Captain M. D. McRae.)

The Court: Well, I think he will admit the facts of circumstances. May I have the question?

(Last question read by the Court Reporter.)

The Court: Well, this witness testified about the [133] man falling and falling straight down. You may inquire.

Q. (By Mr. Krause): What do you say, Captain?

A. Will you state the question again, please?

Q. Is it a safe thing for a man to stand under the pilot ladder while another man is going up so encumbered?

A. It's not considered to be a safe thing for a man to stand directly underneath the ladder, no; absolutely not directly underneath. Certainly, sometimes they do. There are certain conditions where if you want it that way where a man does stand and steady the ladder, well, he is bound if he stands right there and holds on.

Q. Just a moment, Captain. That was not asked for by the question and it is not in this case because there is no claim made that anyone was steadying the ladder.

A. All right.

Q. Now, as you said before, standing within five feet of the ladder was in a place of danger?

Mr. Williams: Object to that. That is not his testimony. That is counsel's conclusion. But, it was not the testimony.

The Court: All right. We will have to search the record.

Q. (By Mr. Krause): May I put it this way:

(Testimony of Captain M. D. McRae.)

Was it your testimony that standing within five feet was in the danger zone?

A. I did not testify to that that I know of. [134]

Q. You didn't say that?

A. Not that I know of. You will have to go back because I do not remember of testifying like that.

Q. All right. Then let's start and ask you what is the danger zone under the ladder under those circumstances?

A. Well, as I said before, it is all the way—depends on the way that the man falls.

Q. I am asking you for the danger zone. We don't know how he is going to fall. What is the danger zone around the foot of the ladder?

A. Well, I would consider if he was standing five feet away from the ladder I would consider that to be a safe distance.

Q. All right. Then, as you explained before, if he lets go with his hands and falls outward he would land on the man in that position, wouldn't he?

A. He would, to a certain extent, yes, he would——

Q. Yes? A. ——if he fell that way.

Q. If he fell outwards he would land on the man at a distance of five feet? A. Yes.

Q. Now, isn't it a cardinal rule on board ship never to stand under a ladder when another man is going up?

A. Well, it is a cardinal rule for nobody to

(Testimony of Captain M. D. McRae.)

stand under [135] a ladder, but it's not lived up to all the time.

Q. Now, that may be another thing, Captain.

A. Yes.

Q. But, it is a rule, isn't it?

A. Well, it is a rule that you're not supposed to stand under a ladder all right when another man is going up.

Q. But, the reason for that is that it isn't only the negligence of the man in letting go of the ladder that might cause injury but the ladder might break or the fastenings part or a rung come out, isn't that correct?

A. Well, you're not supposed to use ladders that break.

Q. What?

A. You're not supposed to use any ladders that break.

Q. But, they do sometimes break, don't they?

A. That's right, they do sometimes.

Q. Now——

A. All machinery breaks down at some time, you know.

Q. When you were Master of the ship what sort of gear was used for putting men over the side to put them onto the staging platforms?

A. Oh, that's—we always use bosun ladders for that, that's principally one of the things, bosun's ladder. Or, for—that's for the crew when they're painting over the side of the ship. They don't paint from the bosun ladder, they just use the bosun's

(Testimony of Captain M. D. McRae.)

ladder to go down and go up from [136] the staging.

Q. They use the ladder to go over the side to get down onto—— A. Onto the staging.

Q. Onto the staging? A. That's right.

Q. And, is that done while the men are out over the water?

A. That's done while—pardon?

Q. The staging is hanging out over the water?

A. The staging is hanging down the side of the ship.

Q. But, it is out over——

A. Naturally if it's out over the side of the ship it's out over the water.

Q. Out over the water. Is that done while the ship is under way? A. No, sir.

Q. They aren't put out on the staging while the ship is under way? A. No. No, never.

Q. But, while they're at anchor in a harbor do they put them out on the staging to paint them?

A. If it's smooth weather and nice weather, but not in rough weather.

Q. But, now, how do the health officials and immigration officials, et cetera, come aboard the vessel—or, did they, [137] while you were Master of the vessel?

A. Well, I don't suppose the vessel I was Master of was any different from the rest.

Q. What did they use to get aboard?

A. Sometimes they climb aboard in a Jacob's ladder and other times they demanded that the

(Testimony of Captain M. D. McRae.)

accommodation ladder be put out for them to come aboard.

Q. They demanded the accommodation ladder?

A. Yes. That's correct.

Q. Where is that that such a demand was made?

A. On the entrance to the Hooghly River on going up to Calcutta the pilots said they wouldn't come aboard until I put the accommodation ladder out.

Q. The Indian health officials?

A. No. They were British pilots.

Q. A British pilot wouldn't come aboard?

A. He was under the pilots for the Calcutta River—or, the Hooghly River up to Calcutta there. Not all of them are British pilots, some of them are Indian pilots too.

Q. I didn't understand, Captain, was it the pilot that demanded the accommodation ladder or was it the health officials?

A. No; both of them. All of them.

Q. All of them. I see. But, ordinarily and particularly in American ports here they come aboard by means of the [138] pilot ladder, don't they?

A. Well, as a rule they do but there are some ports in America where they demanded it too.

Q. Mexico and South America?

A. Mexico and South America is very definite that they demand the accommodation ladder.

Q. That's correct. But, when you come from a foreign voyage into the Columbia River, the Willamette River, the health officers and the immigra-

(Testimony of Captain M. D. McRae.)

tion inspectors come aboard by the Jacob's ladder, do they not?

A. If they—if the ship anchors in the stream, waits till the morning, she comes alongside the dock, they come aboard the ship right alongside of the dock, not out in the stream.

Q. Well, is the ship permitted to dock before the health examination has been made?

A. That is correct.

Q. Here in Portland?

A. That is correct. But, nobody is allowed to go aboard.

Q. Nobody is allowed to go aboard and nobody is allowed to get off?

A. To come ashore, that's right. The ship is allowed to dock, though.

Q. Have you been on a vessel, Captain, when the health officers and immigration officials boarded the vessel right here in the Willamette and Columbia rivers by means of the [139] pilot ladder?

A. Yes, I have had them board the ship by means of a pilot ladder.

Q. Is that the usual way they board?

A. Not usually. If the ship comes direct from sea and comes right up here to Portland, she anchors overnight and she can't clear here before six o'clock in the evening, wait till morning, comes to the side of the dock at six o'clock and then they board her right at the dock, come aboard on the regular gangway.

The Court: May I make just a point of inquiry?

(Testimony of Captain M. D. McRae.)

Is the Master of a ship flying the American flag permitted to bring his ship right up to Portland without a Columbia River pilot?

The Witness: Not now.

The Court: Well, that is what I was wondering.

The Witness: He was asking about immigration.

Mr. Krause: We were talking about health and immigration officers.

Q. The pilots all come aboard by means of pilot ladders? A. Not always.

Q. In American ports, then?

A. Not always.

Q. Not even in American ports?

A. Not always.

Q. Well, if the pilot is taking her down the river obviously [140] he boards at the dock where the ship is leaving, how does he get off down at Astoria?

A. He gets off down at Astoria with the Jacob's ladder all right unless the ship is going to dock at Astoria and then he gets off the regular gangway.

Q. All right. Now, then, when the river pilot gets off at Astoria and the ship is going to sea the bar pilot goes up the pilot ladder, doesn't he?

A. Unless she is at the dock. Yes, he goes up the—he goes up the——

Q. Yes.

A. But, take it in this circumstance and that pilot comes up and said he didn't want to go up the Jacob's ladder we would have to put an accommodation ladder out for him.

(Testimony of Captain M. D. McRae.)

Your Honor, I think I made a little mistake in my answer to you that a ship coming from sea—the Master can take that ship up the river without a pilot if he wants to take that ship.

The Court: Oh. He can?

The Witness: He can coming from sea.

The Court: I had just always understood that he had no authority.

The Witness: He has got the license to do it.

Mr. Krause: The Master himself is excluded.

The Court: I see. [141]

Mr. Krause: You couldn't have anybody else do it without having a license.

The Court: Thank you.

Q. (By Mr. Krause): Now, you said that men returning after they had been on shore after months at sea are usually not half lit up but all lit up. That was the statement you made advisedly, wasn't it? A. That's correct.

Q. I suppose that goes for the licensed officers as well as the members of the crew, doesn't it?

A. Well, no, I wouldn't say that. It's possible that it could happen but he wouldn't last very long under my command if he came back like that.

Q. Then, this statement of yours that they are not half lit up but all lit up would apply only to the unlicensed personnel?

A. That's right. That's what it would apply to. But, then, there are exceptions to the rule. They could come back plastered too.

Q. Now, I believe that the facts in this case—

(Testimony of Captain M. D. McRae.)

and that is the only evidence I have heard—is that this Jacob's ladder was made fast to the boat deck and—— A. I——

Q. ——and therefore the ladder would continue right on past the main deck up to the boat deck, wouldn't it? [142] A. That's correct.

Q. All right. Now, then, when a man is going to get off on the main deck why doesn't he hold onto the ladder until he gets off onto the main deck?

A. Well, he could hold onto the ladder all right but he has still got to crawl in through, he has got to let go of the ladder because the ladder is on the outside of the ship, not on the inside.

Q. How high is that rail there on the main deck ordinarily? A. You mean the gunwale?

Q. Yes. Well——

A. The bulwarks, I mean?

Q. The bulwarks.

A. Well, run about four feet high, it depends. That's just about the average height, four feet.

Q. About four feet high?

A. About four feet high.

Q. Therefore, the ladder would only be out of his reach after it was down to that point below the bulwarks, isn't that right?

A. Well, he has got to climb up the ladder till he gets his feet level with the top of the bulwarks in order to get in through.

Q. And all that time he hangs onto the pilot ladder, doesn't he? [143]

A. Well, until he starts to get in, he has got to

(Testimony of Captain M. D. McRae.)

let go of it. But, he can't come in under the boat deck without letting go of the ladder some time. He can't take the ladder in with him.

Q. If a man is of ordinary size, five foot five, six, seven inches, do you mean to say he has to let go of the ladder before he is standing on the deck?

A. He is up—when he is coming in his feet is on the top of the bulwarks, four feet up, he has got to drop down with his feet or else he comes—he can let himself down hand-over-hand, maybe, on the ladder but one half of his body is still outside of the bulwarks then and the other half is inside. It would be a comical way for anybody to come in from a bosun—I—if I caught somebody doing that, why, he would certainly catch the devil from me.

Q. He can jump down four feet and he can hold onto the ladder all the time, can't he?

A. Well, unless he turns around some way or back, I don't see how he could do it. It's possible to be done, all right, I can see that, but it wouldn't be a very feasible way for a man to come in off a bosun's ladder. I certainly would say that if I caught somebody doing that they certainly would be told he was to come in.

Q. Well, you tell us now how you would tell him how to come in. [144]

A. What?

Q. You explain to us now how you would tell him.

A. We haven't got a bosun's ladder rigged up from the boat deck. I can show you how to tell a man how to come in.

(Testimony of Captain M. D. McRae.)

Q. No. But, I want you to explain it to me. It was rigged to the frame of the boat deck and went past the main deck? A. Yes.

Q. Now, how would a man under those circumstances get down onto the main deck from the ladder?

A. In the first place, as far as the man gettin' in, he gets in the best way he can. It's no feasible place for—for a bosun's ladder to be fastened to the boat deck and the man to have to come up and come in under that condition. It's no feasible place for that bosun's ladder to be made fast in the first place. The condition of a man coming up in through that—under that condition is some way that is just works it in. There is a different way you can come in but it just don't make sense in having the bosun ladder rigged that way only for lifeboat drill. When we use it for a lifeboat drill for the men coming down from the boat deck to the lifeboat in the water, then he comes onto the bosun's ladder from the boat deck, he don't come on from the main deck.

Q. All right. When you make it fast to the bulwark at some other point or right there in under the boat deck then you say you have nothing to hang onto when you climb over [145] the rail, is that correct?

A. Up above if you can grab a pipe or something, yeah. But, generally—pipes running along under the main—under the boat deck, you can grab a hold of one of those pipes and hold onto it and lower—drop yourself down——

(Testimony of Captain M. D. McRae.)

Q. Yes?

A. —onto the main deck. Well, they are all right.

Q. All right.

A. There is something there. But, if there is nothing there to hold onto you have got to get in the best way you can.

Q. So, if you have the ladder there to hold onto, that isn't any good?

A. Not in the final analysis of getting down onto the boat deck, it isn't. It's all right to get you up there to a point. Where you got to get in and get under the boat deck it doesn't do you any good.

Q. Now, Captain, to get you down to some specific questions, the second assistant engineer was on a liberty launch that had come back from the dock at Sasebo. Are you familiar with that harbor, Captain?

A. To a certain extent. It's been quite awhile since I have been there.

Q. It was one of the big Japanese naval harbors, wasn't it? [146]

A. Yes, that's so.

Q. And, it's a landlocked harbor, is it not?

A. To a certain extent, it is, yes. Not exactly landlocked but all harbors are landlocked to a certain extent if you want to call it that way unless it's an open harbor. An open harbor is a harbor where it's open to every wind that you want to blow. Otherwise a harbor is landlocked because that is the reason it's called a harbor.

Q. The water was smooth?

(Testimony of Captain M. D. McRae.)

A. I wasn't there to know whether the water was smooth or not.

Q. No. But, I am asking you to assume that these are the facts, Captain. A. That's right.

Q. Yes. The launch was 25 to 30 feet long and from 7 or 8 to 12 feet beam, those are the different estimates. A member of the steward's department is climbing the ladder with one bottle of whisky under his left arm and clutching another bottle of whisky by the neck in the right hand and he is going up a pilot ladder in good condition with the light so that you could see every step.

A. I don't—you want me to answer that?

Q. Well, there isn't any question yet.

A. Uh huh.

Q. That type of thing you said was a dangerous thing [147] to do, didn't you?

A. I certainly did.

Q. All right. Now, the second assistant engineer is standing down on the launch while this is going on and standing four or five feet from the foot of the ladder. What duty, if any, did the second assistant engineer have under those circumstances?

A. None.

Mr. Williams: I am going to object to the question, your Honor, because it does not cover the element of knowledge. His duty could only depend on what knowledge he has of the man in this position that he has described. If he wants to ask about his duty to observe him or if he had observed him,

(Testimony of Captain M. D. McRae.)

what his duty is, I have no objection. But, he leaves it wide open this way.

The Court: Well, I assume if you take the witness' major premise that most of the men coming back would be half crooked I suppose the witness is supposed to be entitled to know what the condition——

Mr. Williams: Well, what about the bottle and all that? I mean, this man on the ladder which he has described—you can't——

The Court: I think it is more argumentative as to the weight of the thing rather than the admissibility of the question. But, so that the witness would have the benefit [148] of the doubt please include in your hypothetical, if you know, what opportunity the second assistant engineer had of knowing or observing the member of the steward's department climbing the ladder.

Q. (By Mr. Krause): You may assume that the second assistant was sober, he had had a drink of beer ashore, he says, and he is standing on the deck of the vessel with an unobstructed view four or five feet from the base of the ladder with an unobstructed view of the ladder and the man climbing the ladder. Now, what if any duty did the second assistant engineer have with respect to the man climbing the ladder and with respect to himself?

A. As far as the duties of the second assistant, when he was aboard that launch, as I stated before, he was aboard that launch as a passenger only.

(Testimony of Captain M. D. McRae.)

Q. All right. Then, with respect to the man climbing the ladder he had no duty?

A. Not at all unless the Master or somebody from the——

Q. All right.

A. ——give him authority to tell that coon, or whatever he was, to get the heck off the ladder with them two bottles of whisky and go up without them.

Q. All right. He had no obligation to the man climbing the ladder, no duty?

A. Right. [149]

Q. Now, what was his duty with regard to himself?

A. You stated that the boat was around ten feet wide, he was five feet away from it, he was right in the middle of the boat. I think he exercised his duty to keep away from the ladder as well as he could without going clear over on the other side of the boat which is only ten feet wide, you said.

Q. Well, it might have been less than that.

A. Might have been more too.

Q. The estimates are from six to seven feet to twelve feet wide.

A. If he had to go more than seven feet and the boat was only seven feet he would have to walk over the side of the boat——

Q. Yes? A. ——on the water.

Q. And, the ladder split the launch about midships or, that is, about in the middle fore and aft and the launch was 25 to 30 feet long.

A. Generally those launches are built so the

(Testimony of Captain M. D. McRae.)

space for the passengers is all on the after end, the pilothouse is forward, and takes up about half of the boat. The other half of the boat is open and there is where the crew all gather——

Q. All right.

A. ——in the after end of the boat. [150]

Q. All right. Then, we will say if he was standing within five feet of the base of the ladder, under those circumstances he was taking all precautions for his own safety that you would suggest?

A. Well, I would consider that if I were standing five feet away from the ladder I would be safe under conditions——

Q. You would consider yourself safe?

A. Yes. Because, anybody can drop down and come on top of the whole bunch of them there, the fact that he came on top of three men, he didn't come on top of one, as far as I can understand.

Q. All right. Then, the statement I made—as far as you're concerned there were no other precautions that the second assistant engineer should have taken?

A. I can't see any that he should have taken.

Mr. Krause: That's all we wanted to know. Thank you.

Mr. Williams: Is that all your questions?

Mr. Krause: I am through, yes.

The Court: Redirect?

Mr. Williams: Yes.

(Testimony of Captain M. D. McRae.)

Redirect Examination

Q. (By Mr. Williams): Captain McRae, is it the duty of a second assistant engineer to give instructions to a member of the steward's department, let's say, a third assistant cook, as to how a [151] Jacob's ladder should be climbed? Is that part of his duty aboard the ship? A. Certainly not.

Mr. Krause: Well, Your Honor, that, of course, is a general question. He has already specifically testified that the officer has no duty.

The Court: Yes. I think you covered that pretty well in your direct.

Mr. Williams: I want to get to the point of whose duty, Your Honor.

The Court: Well——

Mr. Williams: I will withdraw the question.

The Court: This witness testified fully as to whose duty it was to supervise the boarding of the ship.

Mr. Williams: But, I meant, though, as a matter of instructing, training, and things of that nature.

The Court: Is that a matter of issue?

Mr. Williams: Yes.

The Court: Well, let's be advised where.

Mr. Williams: First of all, we contend in Contention 2e that respondent was negligent for having failed to instruct crew members of said vessel as to a proper and safe manner in which to ascend or descend the pilot's ladder.

The Court: All right. Then, you may reopen your direct examination. [152]

(Testimony of Captain M. D. McRae.)

Direct Examination—(Reopened)

Q. (By Mr. Williams): Who has the duty if such a duty exists aboard a ship to instruct a member of the steward's department as to how to climb a Jacob's ladder? Whose duty is that aboard a vessel?

A. That is the deck—the deck department's duty and whoever might be in charge of the deck, as I stated before, should be there and tell those fellows how to come up a Jacob's ladder.

Q. What I have particular reference to is this, Captain, is in the manner of training men aboard the ship. Now, upon whom falls the duty of seeing that the men aboard the ship are properly trained to carry out their function aboard the ship?

A. That is done at lifeboat drill where they climb up and down ladders to go into the boats when they're lowered to the water.

Q. Yes.

A. There is where the training of climbing up and down a Jacob's ladder is concerned.

Q. Yes?

A. The man in charge of lowering the boat and getting the men into the boat and getting her away from the ship for a lifeboat drill is to train those fellows how to come up and down a Jacob's ladder.

Q. Oh. Is that where inexperienced crew men learn how to climb a Jacob's ladder?

A. That's for all the crew that he has got on that boat. He is in charge of that boat.

Q. Yes?

(Testimony of Captain M. D. McRae.)

A. And, if anything comes up that's his crew.

Q. Well, the entire lifeboat drill is under the supervision of whom? A. Of the Master.

Q. And, the individual——

A. Individual——

Q. ——boats——

A. ——the first mate, second mate, third mate, has got a boat apiece and then the other one is generally given to the chief engineer to be in charge of that boat. Liberty ship, four lifeboats: first mate, second mate, third mate, and chief engineer.

Q. As second assistant engineer is not in charge of a lifeboat, is he?

A. Not on the ship I was on. There is a possible chance that he could be assigned in charge of a lifeboat on a big passenger ship.

Q. Yes?

A. But, where there is other officers to take over without putting one of the assistant engineers in charge, it's—in [154] the case of a big passenger boat even the bosun is assigned to a lifeboat to be in charge of a lifeboat. A steward or one of the the stewards or the purser on a big passenger boat is even assigned to a lifeboat where they carry, oh, let's see—sometimes as much as twenty lifeboats on a big passenger boat, maybe more.

Q. Captain, if a man is climbing a Jacob's ladder and his hands are encumbered by packages or bottles and he has something in one or both of his hands, would that render more difficult getting off

(Testimony of Captain M. D. McRae.)

the Jacob's ladder at the main-deck level when the Jacob's ladder was rigged to the boat deck?

A. Personally, I don't see how the guy ever got started up the bosun's ladder with a bottle under one hand and a bottle under the other hand. I don't know how it happened.

Q. Well, just assume that happened. Would the presence of those things in his hands render getting around there more difficult?

A. Why, certainly it would. Absolutely.

Q. It is true, isn't it, that he would have to step around the edge of the ladder, the side of it, to get off onto the rail, wouldn't he?

A. He has got to get—he has got to step off it and get his leg over the top of the—of the bulwarks and get over—his leg over the top. Naturally, he has got to step off the ladder. Whether he steps off it directly straight up or goes [155] over sideways, he has still got to reach up and get his foot over the bulwark.

Q. What I mean is this, Captain, he is climbing the ladder and attempting to get off at the main-deck level and the ladder goes on up to the boat deck?

A. Oh. Oh. Oh. I see what you mean now.

Q. He would be on the outboard side of that ladder, wouldn't he?

A. Certainly. Yeah. I thought you were——

Q. He would have to go around it, wouldn't he?

A. I thought you meant when the ladder was fastened to the main deck.

(Testimony of Captain M. D. McRae.)

Q. I don't mean when he is going over the rail, I mean when he is getting off it.

A. Yes. He climbs up the ladder directly to the top of the bulwark, anyhow, and then how he gets in from there, well, it's a different story.

Q. Well, the ladder would be fastened up on the boat deck and otherwise it's hanging free, is it not?

A. That's right.

Q. That's the normal way of rigging?

A. It's hanging free from there on.

Q. And as he steps off it it could very easily sway or move, could it not?

A. Oh, yes. Sure. Very easily sway. [156]

Mr. Williams: I have no further questions.

The Court: The cross-examination?

Mr. Krause: I have none.

The Court: That's all, Captain. You may step down.

We will take a five-minute recess.

(Recess taken.)

The Court: Libelant's next witness.

Mr. Williams: Call the libelant, your Honor.

JOHN FARLEY

produced as a witness in his own behalf, having been previously sworn, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Williams): Mr. Farley, when you were last on the stand I believe you testified up to the point of your injury aboard the liberty launch

(Testimony of John Farley.)

and you stated that you were taken to some hospital at shore, did you not?

A. I was taken to the Army hospital.

Q. All right. What occurred following that?

A. They took me there and they examined me.

Q. In the Army hospital?

A. In the Army hospital.

Q. Where?

A. In a room where they just——

Q. No. I mean, is this in Sasebo, Japan?

A. That's at Sasebo.

Q. All right. Go on.

A. And then they taken me down and X-rayed me and told the men that brought me over that I wasn't going back to the ship, that I had my clavicle busted. I don't know nothing only just what they told me, see. And, my back was injured. And then——

Q. How long were you there? [158]

A. I was there from the 6th and left there the 24th.

Q. Of April? A. Or, 25th of April.

Q. Now, during that time what was done for you? Were there any braces put on you or what further medical treatment did you have?

A. They sand-bagged my back there and after about ten days they taken me out and took another X-ray and put a brace on me, cast— a regular cast on my shoulder. And then I stayed there awhile, maybe eight or ten days longer, and then they says I was going back to the States.

Q. Now, while you were at Sasebo, were you

(Testimony of John Farley.)

placed in any other type of cast other than the shoulder cast for your broken clavicle?

A. No. I just had the shoulder cast on me, that's all.

Q. All right. And, during that time how did you feel, were you in any pain?

A. Well, I had pain in my shoulder and my back has always hurt me.

Q. Yes?

A. But I had most of the pain that was bothering me was in my shoulder. My arm would even turn—you know, just black out from the pain I had. I couldn't even sleep or rest or nothing with the way it was hurting me. I took pills. [159]

Q. Were you given any medication or pills or any drugs?

A. The doctor gave me pills.

Q. Now, you stated that on approximately the 25th of April—the 24th or the 25th——

A. Around the 25th because——

Q. ——you left from there?

A. I left from there.

Q. You were sent——

A. I was sent from there that morning. They taken me out of the hospital that morning and told me I was going to Yokohama and going back to the States. And then they brought me over to a Japanese hotel.

Q. Where, in Sasebo?

A. In Sasebo.

Q. In Sasebo.

A. Brought me over to this hotel. After they brought me up to the agent's office they taken me

(Testimony of John Farley.)

from there and brought me over to the hotel because I couldn't stand up with this cast and hold—both of my arms were like that (witness demonstrates). So, I stayed there in the room and they taken my clothes off and they put me to bed in there on the floor. Then about ten o'clock that night they come up and woke me up and, you know, I was lying there. They was going to wake me up.

Q. When you say "they," who do you mean?

A. The Japanese girl in this hotel.

Q. All right, sir.

A. They took my clothes off and then they come up there and they put them on again and taken me downstairs and they gave me something to eat. And they had a taxicab there for me and the taxi driver, he taken me down to the depot, they put me in this Pullman train and I was on my way then to Yokohama. And on the train there was an Army officer on there and I got some aspirin tablets from him because my arm was hurting me. I couldn't just set there in pain all the time. And then I arrived.

Q. Were you in a bunk most of the time or were you just sitting up, or what?

A. I was just sitting up and walking around in there just to get on my feet now and then.

Q. How long did the train ride take?

A. Twenty-seven hours.

Q. Yes. What time did you get to Yokohama?

A. I got to Yokohama in the morning early, maybe about six o'clock in the morning or five-

(Testimony of John Farley.)

thirty, something like that, and then I went in the depot and I stayed there.

Q. Were you met there?

A. I stayed there in the depot. No, I wasn't met there. I waited for half an hour or so. One of the agents from the company, a young fellow from [161] New York, he came in there and asked me if I was the fellow that came from Sasebo. He says, "I guess you are the way you look," he says. And I says, "Yes, I am the man." So he taken me out of there and he brought me up to Yokohama to the hotel and he went in the back room there in the hotel and got some coffee and we sat there and talked. And then he taken me up to the company office and when I got up to the company office about eight or nine o'clock in the morning I set around there and pretty soon in come the Captain and the Purser.

Q. Who is the Captain?

A. The Captain on the St. Augustin.

Q. An the Augustin Daly?

A. On the Augustin Daly.

Q. What is his name?

A. Carusoe, or something like that.

Q. Is it Caroso? A. Caroso.

Q. And what happened there?

A. He saw me there and he looked at me and he says, "Gee, John, I didn't know you was in that shape." And, he says, "God! I can't bring you back to the United States. I can't bring you on the ship." So, then, he said, "Did you have anything

(Testimony of John Farley.)

to eat yet?" And I says, "No, I haven't had nothing to eat." So, he says, "Well, come on," he says, "I have got some tickets." So, he brought me over [162] to the Continental Hotel and I went up there and they got us set at the table, the Captain, the Purser, and myself, and they eat their breakfast there too and I had my breakfast there.

So, then, he asked me if I would go out to the ship?

Q. Well, now, who did?

A. The Captain—and get my sea bag that I had aboard the ship. So, I told him, I says, "God!" I says, "I couldn't go out to the ship in this condition. I'd fall out of one of them motorboats if I tried to go over," because I was topheavy—I was heavy on top.

Q. With the cast?

A. With the cast. So, he says, "Well, you go out there," he said, "we got the accommodation ladder down," he says, "and the fellow can bring your stuff down to you and put it in the boat so you can bring it ashore." I says, "No, I won't take no chances going like that." So, they sent the stuff over to me to the hotel.

They got me a hotel room. Then later on they went and got me a room in the Oklahoma Hotel and I stayed in there from the 27th until the 10th.

Q. Of May?

A. 10th. Till the 10th or the 11th of May.

Q. Then where did you go?

A. Then I went on the J. L. Luckenbach. They

(Testimony of John Farley.)

made arrangements for me to go on the J. L. [163] Luekenbach and I came to Vancouver.

Q. Vancouver where? A. Vancouver, B. C.

Q. British Columbia?

A. British Columbia. And, I arrived there, I suppose, around the 2nd of June, or something like that, I am not sure exactly when it was. I think that's when it was. And then I had some money on me so I went and I paid my own way from Vancouver to Portland, Oregon, because I wanted to get home as quick as I could.

So, the next morning I went up to the U. S. Public Health Service and I reported in up there and Dr. Craig had them take some X-ray pictures of me. And so, then, they sent me right away to Seattle. The next day I left for Seattle.

Q. Where in Seattle?

A. The Marine Hospital.

Q. Is that a U. S. Public Health Service Hospital?

A. That's the U. S. Public Health Service, yes. So, when I got in the Marine Hospital I laid there until about the 20th. They took X-rays of me and then they put a body cast on me and this other cast I had on here that I had on my shoulder I broke that in the hotel after I went ashore.

Q. What hotel where?

A. That's this hotel now in Yokohama where [164] I had breakfast. I was just talking about my cast up here (indicating). When I got in there they asked me where my cast was on my shoulder

(Testimony of John Farley.)

so I told them, I says, "Well," I says, "they had a figure eight made out of gauze and they had it stretched around my arms and around like that (demonstrating) to pull me back. Well, that thing there, I couldn't take no bath or nothing, sweatin' and stuff, so it got to stinkin'." So, then, I told them that's what I did, I took that cast off, I says, because it just——

Q. The gauze?

A. Just out of gauze and paper. He shoved gauze and paper up in it, see.

So, then, they kept me there and they put this body cast on me and then I had this big cast put on me then from the top of my neck down to my——bottom of my rumpus.

Q. Yes?

A. And, then, I stayed there awhile and then they told me I could come on home for thirty days.

Q. Well, about how long were you in that Marine Hospital the first time you were there, do you know roughly?

A. Oh, I'd say maybe a month and a half or a month, or something like that. It shows in my records how long I was there.

Q. Then, they sent you home for recuperation?

A. Just told me to go on home for a month.
[165] I could go on home for a month and then come on back again.

So, I came on back and they cut the cast in two.

Q. Took it off?

A. They took and cut it. They took a business

(Testimony of John Farley.)

and cut the cast in two so they could take some more X-rays. So, after they did that then they sent me out and had a brace made and then they put this brace on me and they told me not to take and do any heavy lifting or anything like that when they sent me out with my brace. So, then, I came home again. And then I went back and forth, I don't know how many times I have been up there. That will show in my record how many times I have been there.

Q. Yes. Suppose you tell me about the last time you were there?

A. Well, I went up there on the 13th of July and they took some X-rays of me.

The Court: That is the last, this present month of July?

The Witness: No. This is——

The Court: 1955.

The Witness: No, not in 19—it was two years—1952, I think it was. I don't know. It shows in my record.

Mr. Williams: No. '52 is the year of your injury.

The Witness: In 1953. 1953.

Q. (By Mr. Williams): You first reported in that hospital, you said, about June, 1952? [166]

A. Yes.

Q. And then the last hospital visit was, you say, now, July of 1953?

A. That was '53. Then, a year later——

Q. Yes. All right. Tell us about that.

(Testimony of John Farley.)

A. I reported up there.

Q. Tell us what transpired there.

A. They taken more X-ray pictures of me and I stayed in there for about eight or ten days. And, I was taking therapy treatment, and so I come out of therapy treatment and they asked me to go home and do some light duty and I told them I would. And, he says then, he says, "You can do heavy duty or you can go to work on a ship," he says, "and after that you can go back to work," he says. So, I went down and I tried a light-duty job on a ship.

Q. Just a moment. Am I correct in understanding that they discharged you from the hospital that last time?

A. Yes, they discharged me and told me they did all they could do for me.

Q. Did they discharge you as fit for duty?

A. That's all they could do for me, couldn't do anything more for me.

Q. Couldn't give you any more treatment?

A. Couldn't give me any more treatment.

Q. Yes. And, they said you were fit for duty?

A. They says some words—he used "indefinite" or something like that. I don't know what the word is.

Q. So, what did you do following that after your discharge?

A. Well, I went home and I worked around and I would go out and I'd put my brace on and I'd take and go out and mow some grass and stuff like

(Testimony of John Farley.)

that and Jeez! that hurt my back when I was doing that. So, I'd keep it up anyway and I kept doing work around there and—little bit now and again, and my wife would give me treatments around there because she likes to work around hospitals. And so she gave me treatments. I went and bought me a little electric business.

Q. What is it?

A. It's an electric stimulator.

Q. Like a vibrator?

A. Like a vibrator. I bought that.

Q. Did anyone in the Public Health Service suggest that you get that?

A. They told me to get a heat lamp and put that on my back and it maybe would do me good.

Q. Did you get a heat lamp?

A. So I got a heat lamp. Then I got this vibrator and I put that on there and I find out my back was still hurtin' me all the time and then I figured "Shoot! I'm going to get me another doctor and see what he is going to say about it." [168]

Q. Now, just a moment, Mr. Farley, before you get there. During this time following your discharge did you do any work at all; in other words remunerative employment that you got paid for and, if so, when was it?

A. I went to work aboard of a ship as a night engineer.

Q. When was that about?

A. I think it was in September.

Q. Of 1953? A. In 1953.

(Testimony of John Farley.)

Q. Two months following your discharge from the hospital, something like that?

A. Yeah. Yes.

Q. How did you do on that job?

A. Well, I couldn't do very good on it. I couldn't shut the valves off. I couldn't crawl in the tunnel and shut the—I was taking water on that night and I wanted to do the work and see if I could and I couldn't cut the mustard. And Ray called me up then to go on another ship.

Q. That is your business agent you are referring to?

A. That's my business agent. He called me up to go on another ship and says, "How did you make out down there?" Well, I told him I had another fellow shut some valves off for me and open some valves. And he said, "John, if you can't do the work," he says, "well, you can't cut the mustard. I can't send you down there." I says, "Well, I just can't do it." [169]

Q. Then, you said that in 1954 you, during '53—the remainder of '53 you were receiving no medical care from anyone in particular following July 13th?

A. I got no—nothing after the 23rd day of July.

Q. Except your home exercises?

A. Just home exercises.

Q. When did you next go see a doctor for treatment?

A. A year afterwards.

Q. About when was that?

(Testimony of John Farley.)

A. Well, I suppose it was 1954, then, I saw a doctor.

Q. Around June, or something like that?

A. July. I suppose July. Maybe June or July I saw a doctor. They recommended me to him up in —my friend out there, Ernie Langley recommended me to him.

Q. What is the doctor's name?

A. Dr. Berg.

Q. What did he do?

A. Well, he taken me and sent me over and had X-ray pictures taken of me and then he asked me, he says, "If you want to take and go get some therapy it would do your back good." So, they recommended me to go to the Portland Rehabilitation Center right here in Portland. Well, I been going to the Portland Rehabilitation Center now for pretty near a year.

The Court: I think this is a good place to interrupt.

Mr. Williams: Fine. [170]

The Court: We will recess until one-thirty. [171]

* * * * *

Afternoon Session

(Court reconvened pursuant to recess.)

The Court: You may proceed.

Mr. Williams: Mr. Farley, will you resume the stand, please?

(Whereupon Mr. John Farley, previously sworn as a witness in his own behalf, resumed the witness stand and testified as follows:)

(Testimony of John Farley.)

Mr. Williams: Mr. Farley, at the noon recess I believe you were testifying concerning going to see a doctor in the year 1954, a Dr. Berg, I believe.

A. Dr. Berg. I went to see Dr. Berg.

Q. And I believe you testified that Dr. Berg prescribed some physiotherapy for you?

A. He sent me over——

Q. At the Portland Rehabilitation Center?

A. He sent me over to have some X-ray pictures taken and I got them back and he talked to me and told me if I go to the Portland Rehabilitation, why, they may can do my back some good. I went over there and I been there for a year, pretty near.

Q. How often do you go to the Portland Rehabilitation Center?

A. I was going five days a week. [172]

Q. For a period of what time?

A. Oh, for about ten months.

Q. Yes?

A. And then I been—taken a tour of light duty at the—around my home running my mower with my brace on and I thought I'd try my back and see how it was then but it still hurts me.

Q. Now, you go now about how often?

A. Three days a week: Monday, Wednesday, and Fridays.

Q. Yes.

A. And, I take medicine all the time. I have got medicine I take all the time.

Q. How do you get in to go to the Portland Rehabilitation Center?

A. I drive my car in.

(Testimony of John Farley.)

Q. From Reedville?

A. From Reedville into Portland, and then when I get done I drove right back home again.

Q. How far is that in and back?

A. About twelve miles.

Q. You mean each way?

A. Twelve miles each way.

The Court: Two to three times a week, you say?

The Witness: I was coming in five days a week and then I stay in three hours each day. [173]

Q. (By Mr. Williams): You are now going just three times a week?

A. Three times a week I am going now for the last month.

Q. And do you go to see Dr. Berg from time to time?

A. I go to Dr. Berg about once a month. I was to him about a month ago.

Q. Yes?

A. And I would go now if this Court—if I wasn't in here. I was ready to go up and see him again.

Q. This was the day you were to see him?

A. Yes.

Q. Has there been any—had Dr. Berg prescribed any medicine for you that you have taken for your condition?

A. Yes, sir. I take medicine all the time.

Q. Do you know what they are?

A. No, I don't. They're some kind of pills. I taken them and now I run out of them and now

(Testimony of John Farley.)

he is giving me some salts—some kind of salts to take.

Q. You don't know what they do or what they are for?

A. I don't know what they're for. I taken them. I been buying them all the time. I buy them myself.

Q. Are they for the relief of pain or for what purpose, if you know? A. I don't know.

Q. You don't know what they're for? [174]

A. I don't know.

Mr. Williams: May I have Libelant's Exhibit Number 9, the medical bills?

(Whereupon the Crier hands the document to the witness.)

Q. (By Mr. Williams): The large sheet of paper there, Mr. Farley, what is that?

A. This large bill is the dates of screening and examination of John Farley and the hours of physical therapy treatment at \$3 an hour for so many hours each week and month. They got it wrote down here. The whole bill is \$903.75. They got that down here. And I paid September, 1954, \$6 and they subtracted that there and it gives it \$903.75.

Q. What is the total amount that you have incurred not counting what you have paid?

A. \$903.75.

Q. That is the total amount? A. Yes, sir.

Q. On which amount you have paid \$6.

A. Which amount I have paid. Well, I have paid all these bills here.

(Testimony of John Farley.)

The Court: Whether he has paid them or not is of no consequence.

Mr. Williams: I realize that, your Honor. I just want to get the total amount. I am not certain of that. [175]

The Witness: The balance is \$903, it says.

Mr. Williams: Yes.

The Witness: And 75 cents.

Q. (By Mr. Williams): And, the other smaller slips there you have do you find some prescriptions there? Now, are those prescriptions that are ordered by your doctor to be filled?

A. The doctor ordered these and told me to get them filled and I have got them filled and I got the bill every time I paid for them.

Q. What are the other bills over there (indicating)?

A. Special examination and X-rays. X-rays, that's what they are.

Q. Yes. What are they, doctors' examinations?

A. Dr. Berg and Kimberley.

Q. Kimberley? A. And Dr. Kimberley.

Q. That is the first one and then what is the next?

A. This here up on top is C. Todd Jessell.

Q. Yes?

A. And that bill there is \$45 for refer to Dr. Berg. Dorsal spine, lumbar spine, pelvis, and right shoulder.

Q. That's for X-ray?

A. That's for X-ray. June. And the next one is

(Testimony of John Farley.)

from Dr. Todd Jessell and is \$35. Dorsal spine, lumbar spine, and right shoulder. [176]

Q. The next is from which doctor?

A. And the next is from Richard F. Berg.

Q. Yes.

A. And it says July the 21st, '54. Examination and report.

Q. You needn't read it all, Mr. Farley.

A. But the bill here is \$65 and—even.

Mr. Williams: May I see that, please, Mr. Bailiff?

(Whereupon the Crier hands the document requested to Mr. Williams.)

Mr. Williams: I think you will find, Mr. Farley, this is ninety-five less the thirty-five dollar credit.

The Witness: Yes.

Mr. Williams: I move the introduction of these exhibits into evidence.

The Court: What is your position, counsel?

Mr. Krause: Well, I have no objection to the identification and so on and I am willing to stipulate that if the persons were called that rendered those bills that they would testify that they were reasonable. There is, however, a bill there for over \$900 for physiotherapy that has continued for a long time and I do want to be able to ask Dr. Berg about that as to the necessity of continuing that for all this period of time.

The Court: Yes, I understand your position [177] about it. I think you certainly have the right to examine the doctor about them.

(Testimony of John Farley.)

I believe as long as this witness testified he incurred those there isn't any evidence before the Court that they were necessarily incurred as of this moment and I suppose perhaps we had better wait for the doctor before you make your formal offer.

Mr. Williams: He has testified that the doctor ordered them for him.

The Court: I know, but that is hearsay and it deprives the party of the right of examination.

Mr. Williams: I would like to introduce in evidence Exhibit Number 5, agreements between National Maritime Engineers Beneficial Association, Pacific Maritime Association, and Alaska Trade, 1950 to the present date.

The Court: Any objection?

Mr. Krause: I have none, your Honor.

The Court: They may be received.

(Whereupon the document mentioned above by Mr. Williams, Exhibit Number 5 was thereupon received in evidence.)

Mr. Williams: I would like to introduce Exhibit Number 6, United States Department of Commerce continuous discharge book for John Farley provided we identify it. There is no question of identity? [178]

Mr. Krause: No objection.

The Court: It will be received.

(Whereupon document mentioned above by Mr. Williams, being Exhibit Number 6 was thereupon received in evidence.)

(Testimony of John Farley.)

Q. (By Mr. Williams): Mr. Farley, when you were discharged from the United States Public Health Service Hospital in Seattle in July of 1953 were you told whether or not you were to go for any further treatment? Were you instructed as to any further treatment which you should have at the Public Health Service?

A. I asked them that when I was there and he told me that they—there is no use going back to the U. S. Public Health Service any longer. He says that "You're as cured as much as we can cure you." That's what he said to me.

Q. Were you instructed not to come in?

A. Not to go up to the U. S. Public Health Service any longer.

Q. Mr. Farley, since the date of this accident how many days have you worked?

A. I just done one work on the ship one night watch, that's all.

Q. The one night watch which you have previously referred to?

A. That's all.

Q. What are your symptoms at the present time? How do you feel? [179]

A. Well, when I stand on my feet any length of time my back starts giving me pain in there (indicating) just like a toothache. And, if I bend over my back hurts me.

Q. Can you bend over and touch the floor?

A. Oh, gosh, no. I can bend down about ten to twelve inches from the floor.

(Testimony of John Farley.)

Q. You say your back hurts you. Now, where is the area where it troubles you?

A. My back hurts me in here (indicating).

Q. Indicating about the middle of your back?

A. About the middle of my back. And, if I put my hand—that's the best I can put my hand back there (witness demonstrates).

Q. You are referring to your shoulder?

A. Yes. When I do that (witness demonstrates) that hurts my back worse.

Q. That is your right shoulder that you have had the clavicle broken on in this accident?

A. Yes, sir. And, I can't put my arm back there.

Q. Well, how is your back now as compared to how it was, let's say, a year after the accident?

A. Well, I can't—I can't see much difference in my back. It just still hurts me.

Q. Is it approximately the same? [180]

A. Yes, sir.

Q. Can you do anything else with your back now that you couldn't do then or is your back about the same in all respects?

A. In my back when I stand up and everything my back still hurts me.

Q. Yes.

A. And I take the treatments and I get out of the treatments and I go home, I can—I'm taking weights and lifting weights and stuff and I do a little more of that. I can raise more now.

Q. Is that part of your treatment?

(Testimony of John Farley.)

A. That's part of my treatment. I can raise more weights now than I did when I first went in there, I can say that much about it. But, my back still hurts, though.

Q. Now, with regard to your right arm or right shoulder, how is that today as compared to, let's say, July of 1953?

A. Well, I can get my arm up in the air now. Before I couldn't get my arm up in the air at all. I used to have to go sideways with it to get it up in the air. And I have been taking treatments with it and exercise with it and I got it now where I can raise it over my head—straight over my head now. But, I can't put it in back of my back, though.

Q. When did your right shoulder start improving? [181]

A. Since I been taking this therapy up here.

Q. This physiotherapy? A. Yes, sir.

Q. That has been since September of—

A. Since August of last year.

Q. Of '54? A. (Witness nods head.)

Q. Can you demonstrate to the Court in what respect your arm or your shoulder has gotten better? In other words, can you indicate what movement you could not do previously that you can do now?

A. Well, I could show you standing up.

(Whereupon the witness stands up.)

Q. Just turn around and face the Court.

A. When I was in therapy I could get my hands straight out (demonstrating) and now I can get

(Testimony of John Farley.)

them up over my head (demonstrating). Before I could only get them up that far (demonstrating). And I am lifting the weights every day and I get it up to about eight or nine pounds. I take that for an hour every day, therapy in there. And my back, I can bend over—(witness demonstrates). That's as far as I can do and that hurts me in my back now when I do that. My back hurts me settin' in this chair, any place.

Q. Does your back hurt you when you are lying down?

A. My back hurts—don't hurt me when I am [182] lying down. I go home and lay down and my back don't hurt but when I get up and do any work around the house there or I take and feed a few chickens and I run a lawn mower—and I put my brace on when I go out and do that. I put my brace on because I think maybe it will do me good to get out and do some work. I want to go to sea if I could.

Q. Is the strength in your right arm right now the same as your left arm or is one different from the other?

A. Oh, I got more strength in my left arm than I got in my right arm.

Q. Well, how much more? Can you describe that?

A. I couldn't tell.

Q. Are you right-handed or left-handed normally?

A. I am right-handed.

Q. Well, can you describe the difference before

(Testimony of John Farley.)

this accident and after the accident with relationship to the strength in your right arm?

A. I could take a weight, one of them scale weights, a fifty-pound weight, and I could reach down and get it, I can put that over my—over my head. Or I can take a pump and put a steam pump—take a hold of them and throw them on my right shoulder and go down in the gratings in it and put it in the vise and work on them pumps but I couldn't do it now, though. Swing a button set. I can swing a button set, twenty-two pound hammer. [183] But, I'd be afraid to do anything like that now.

Q. Had you had any trouble with your right shoulder previous to this accident?

A. No, sir, I never had none.

Q. You had had no difficulty or pain there?

A. No, sir.

Q. What about your back?

A. I never had no trouble with my back either.

Q. Before this? A. No, sir.

Q. Have you ever been treated by a doctor for any trouble to your back? A. No, sir.

Q. Did you ever injure your back at any time?

A. Not that I remember. I don't think I have ever had my back ever injured.

Q. Yes.

A. I never was in a hospital with it, I know that much.

Q. Yes. Do you have more strength in your right hand now than you had, say, a year ago?

(Testimony of John Farley.)

A. Yes, sir.

Q. And you have more movement of your shoulder—— A. Yes, sir.

Q. ——than you had a year ago?

A. Yes, sir. [184]

Q. Mr. Farley, how long had you shipped as a second assistant engineer, approximately?

A. Well, I got my license in February in '28 and I been sailing pretty near ever since that.

Q. Yes. And, you were fifty-eight years of age at the time of this accident. I believe that's been stipulated, is that correct?

A. Yes, sir. That's right.

Q. I believe it is further agreed as a fact that you were making \$435.89 as a base wage per month at the time of your injury? A. That's right.

Q. In addition to that I presume you made over that?

A. I used to make an average of—when they been paying Saturday afternoons and Sundays, since they been doing that on the last ship I was on—when they started doing that I made quite a bit of overtime. I paid off of that ship and I only worked eleven months and I had over \$7,600 in eleven months when they started that new scale of pay paying overtime for Saturday afternoons and Sundays.

Q. What was your average overtime that you would make monthly while you were serving on a foreign voyage?

(Testimony of John Farley.)

A. On a foreign voyage it would run maybe \$250 or \$200 a month.

Q. Between \$200 and \$250 a month? [185]

A. You lay in port so many days and you lay around and you get every third night a night watch and you get fifteen hours of it and you get that \$1.86 an hour for every hour you stand and beside you get your regular wages on top of that. And Saturday and Sundays the same way. Every third night you get your night watch.

Q. Yes.

A. And, it is easy to make it. Some ships you get on the companies won't pay no overtime. They just let things go and run down. But other ships you can make all you want to make and I try to make all I can get to work on a ship when I get aboard of one.

Q. In addition to the overtime that you make are you furnished room and board aboard the vessel?

A. Yes, sir.

Q. That's in addition to these other amounts, that's not taken out of the basic pay?

A. No, they don't take that out of your basic pay.

Q. In the year 1951 which was the year preceding your injury do you know how much money you made for that year?

A. According to my income tax, that W-2 form I can tell you what that is. I think that's—I got that. I copied that down because I got that here. In '51 I was on the Trans-Oceanic for eleven

(Testimony of John Farley.)

months at \$7,648.73. That's on eleven months on board of that ship. And I got papers, overtime sheets, that I took home with me and every one of [186] them is my overtime, shows on it what I worked. \$7,648.73.

Q. That amount, does that or does that not include the payment that you get for room and board aboard the vessel?

A. No. That's what they take out for my W-2 forms. That's the wages. That's the wages.

Q. Yes. That's the amount that you actually pay tax on? A. That's what I paid tax on.

Q. It is true, is it not, that you pay Social Security tax on not only that but on your room and board aboard the vessel, also, do you not?

A. I guess that's right.

Q. Well, if you don't know, just say so.

A. I think they take out everything on that Social Security, I guess.

Mr. Williams: May I have Exhibit 7, please?

(Whereupon the Crier hands the document to Mr. Williams and thence to the witness.)

Q. (By Mr. Williams): That first sheet appearing on there, just what is it?

A. This is wages paid to John Farley for service rendered SS Augustin Daly February the 2nd, 1950, to August the 13th.

Q. That is one sheet. Are there other sheets underneath that? A. Yes, sir.

Q. What are they? [187]

(Testimony of John Farley.)

A. That's overtime. That's overtime, John Farley, Trans-Oceanic.

Q. Is that in the year 1951?

A. This is the year 1951.

Mr. Williams: I move the introduction of these exhibits into evidence.

Mr. Krause: Well, I haven't seen them.

Mr. Williams: You have seen the one.

The Court: Show them to counsel.

Mr. Krause: No objection.

The Court: It will be received.

(Documents as described above by the witness being Exhibit Number 7 was thereupon received in evidence.)

[See page 457.]

Mr. Williams: We will ask counsel to stipulate regarding these wages that in February, 1952, and it is already in the agreed facts, that his compensation, basic, was at the rate of \$435.89 per month and that overtime was at the rate of \$1.96 per hour.

Mr. Krause: Well, that's still an agreement but I think that's correct. I will stipulate to that.

The Court: What was the amount of overtime per hour?

Mr. Williams: \$1.96, your Honor. Will counsel further stipulate that on June 16, 1953, the base wage for a second assistant engineer, marine [188] engineer, serving aboard a liberty class vessel was the amount of \$531.23 per month?

Mr. Krause: That's the new scale.

(Testimony of John Farley.)

Mr. Williams: And that scale prevailed at the time all the way up to present from June——

Mr. Krause: That's correct.

Mr. Williams: Will counsel further stipulate that the overtime rate since June 16, 1953, to and including the present date is the amount of \$3.29 per hour?

The Court: All right?

Mr. Krause: I don't know. I don't know whether that is or isn't the record.

Mr. Williams: Do you wish me to read it in from the agreement?

Mr. Krause: Well, there are two rates. Whatever it says in the agreement is the rate and it's perfectly agreeable to me to have it read into the record now.

Mr. Williams: Yes. May I have that exhibit (indicating)?

The Court: Is that Exhibit 5?

The Clerk: Number 5.

Mr. Williams: Exhibit 5, yes, your Honor. On page 25 thereof it reads as follows: "Section 16. Overtime and Penalty Time. Effective 12:01 A.M., June 16, 1953, the rate of overtime pay shall be \$3.29 per hour and the rate of penalty pay shall be \$2.19 per hour." Penalty time we have not contended for, your Honor. It involves certain types of cargoes. [189]

Mr. Krause: Well, that isn't correct. Penalty time is time put in on Saturdays and Sundays when

(Testimony of John Farley.)

the ship is at sea. It has nothing to do with the kind of cargo at all.

The Court: Mr. Farley will probably know that. You ask him as to the overtime rate.

The Witness: No, you're wrong, Mr. Krause. The penalty time, it's like if you take and you're off at dinner time and you worked all day you work your four hours and then you take and you have to take and do other work during the noon hour, that's penalty time. That's what they pay. Standing the night watch and there is no fireman down below, the fireman may be drunk, and you have to go down and stand his watch, why, you get your wages and that's penalty time for handling the hides or sulphur or anything like that on the ship or anything when you are working. That's the way it is. That's penalty time. That's anything like working cargo with sulphur and stuff like that and they just work in hides as penalty time and you are working stuff. Tell you what, in the agreement what it consists of it shows exactly what it consists of.

Mr. Williams: May I have Exhibit Number 7, please?

Your Honor, I am merely going to read the total on this exhibit. This is wages paid to John Farley for services performed on the Augustin Daly, the [190] ship in question, from February 2—it says 1950. I'm sure that's an error. It should be 1952 the date he first went aboard it to August 13, 1952. The total amount of wages alone is \$3,221.26. The

(Testimony of John Farley.)

total of wages and FOAB. Actually that includes his room and board, as I understand it, is \$3,361.11. Of that amount it is shown on this statement that, and also stipulated in the pre-trial order, that \$1,859.79 represents unearned wages from the date of his injury, April 7, 1952, to August 13, 1952, a period of, as your Honor can see, slightly in excess of four months and six days. The balance between the two is the amount for just wages not including room and board and that is \$1,361.55 which it is shown was earned between February 2, 1952, and April 6, 1952, a period of two months and four days.

The Court: Well, is this \$1,859.79 that you refer to as unearned wages, is that the maintenance that he was paid?

Mr. Williams: No, your Honor. Mr. Krause, I am sure, can answer that better. But, as I understand, when a crewman is injured aboard the ship he is paid his unearned wages which is his basic monthly pay exclusive of any board and room, exclusive of any overtime or bonus or anything like that to the end of the voyage.

The Court: I see.

Mr. Williams: I would like to read an entry from the log, your Honor. It is to be found on [191] Sunday, April 6, 1952, of the—I believe I have the rough log of the *Augustin Daly*. The entry appears in the center of the right-hand portion of the log on that date and the following appears "1859" that is the time. It says "Entered 100 per

(Testimony of John Farley.)

cent bonus zone westbound" and then gives the last——

Q. Mr. Farley, what is a bonus zone?

A. The bonus zone is a zone where you go into——have it in the Articles—the Commissioner writes it out and it shows from one latitude to another you get so much for whatever you're in. Like when you go from Portland, Oregon, and you hit the 180th Meridian you get \$2.50 a day from there. Like you was going to Sasebo you get \$2.50 a day until you get on the other side of another meridian then when you have hit the meridian, whatever that is, then from Sasebo going to Pusan you're in the hundred per cent zone. If you are getting \$439.50 then you get another \$439.50 added onto your wages what you was making. It's a hundred per cent bonus.

Q. It's a hundred per cent bonus of your basic wages?

A. Of your basic wages.

Q. Does it change the overtime?

A. No. Your overtime stays the same.

Q. Your basic wage is doubled?

A. You double your basic wage.

Q. Was that a war zone at that time?

A. That's a war zone, yes. [192]

Q. I believe it is stipulated you were paid your maintenance from June 1, 1952, to July 23—June 1st being the date you arrived back in the United States, apparently—to July 23, 1953, except for periods of in-patient care, hospital care, presumably, at \$8 a day?

(Testimony of John Farley.)

A. The way they do that, when you are in the hospital you don't get nothing while you're in the hospital. When you're on the outside the company gives you maintenance and cure and they give you \$8 a day. So, if you was in town you have your room rent and your board and stuff like that and they pay you for that.

Q. That's when you are an out-patient?

A. When you're an out-patient.

Q. Yes. And, you received that amount up until—for maintenance and cure exclusive of your—the in-patient time in the hospital up until you were discharged from the hospital?

A. Yes, sir.

Q. Which was July 23rd?

A. I got paid up until July the 23rd.

Q. Have you received any pay for maintenance and cure?

A. No, sir.

Q. Have any medical expenses been paid in your behalf by the respondent since that date, July 23rd?

A. No, sir.

Mr. Williams: I believe that's all at this time.

Cross Examination

Q. (By Mr. Krause): Mr. Farley, you got your first license in February, 1928, and that was a third assistant's license, was it?

A. No, sir.

Q. Got the second assistant's?

A. Yes, sir.

Q. In February, 1928. Then, you have had a renewal on it every five years since that time?

A. Yes, sir.

(Testimony of John Farley.)

Q. You never took the examinations for a higher rating? A. No, sir.

Q. You're just satisfied to stay a second?

A. Yes, sir. I like the second assistant's job.

Mr. Krause: Now, may I see this Exhibit 6, please, the discharge book.

(Whereupon the Crier hands the document to Mr. Krause.)

Q. (By Mr. Krause): Your discharge book for 1951 shows that you signed on a vessel on the 16th of January? A. Yes, sir.

Q. You continued with that vessel until 12-15-51 and were paid off at Galveston? A. Yes, sir.

Q. Now, then, you received your pay until you got back to Portland, did you not? [194]

A. Yes, sir.

Q. So that actually, you received—when did you go back to Portland after being paid off at Galveston?

A. I came right home from—first I quit the ship and the ship paid off in Mobile and then I stayed on the ship until they had a man come from San Pedro, California, a second assistant, to relieve me. They couldn't get anybody there and they asked me if I would do that there as a favor to stay there so they paid me maintenance and wages and transportation back to Mobile if I would stay with the ship. So, I told them I would.

So, I stayed with the ship and they paid me off, I think it was, on the 16th day of that month. What was it?

(Testimony of John Farley.)

Q. And how far past that date did you get your pay?

A. I got my pay right then. That's when they paid off.

Q. Didn't they pay your wages until you got back to the Pacific Coast, back to Portland?

A. Yes, sir, they gave me my transportation and wages back to——

Q. And wages?

A. And wages back to the Pacific Coast.

Q. So, how much wages after the 15th of December did you receive for how many days?

A. It runs around \$125 they give you now. That's what it is, about \$125 transportation money [195] that they give you from Galveston to Portland, Oregon, where I signed on the ship.

Q. What wages? How much for wages?

A. Well, that all—that all includes in your transportation. They make a—they make a regular bonus of it. They say, "Well, transportation and wages \$125 back to Portland, Oregon" when you pay off with the Commissioner.

Q. All right. Well, then, it was somewhat more than eleven months that you got paid for?

A. No. It was just exactly eleven months that I got paid.

Q. Well, all right. Did you work continuously twelve months each year, Mr. Farley?

A. Well, I worked twelve months on some ships. I have stayed on some ships as high as eighteen and nineteen months.

(Testimony of John Farley.)

Q. Continuously?

A. On a ship, yes. I was first assistant on the Francis W. Parker, you will see in there, for nineteen months straight during the war.

Q. You were a first assistant then?

A. I was first assistant engineer. I took her out of here as first assistant and I got off in San Francisco when they got a man to relieve me there and come back home.

Q. Did you have a temporary license as first assistant?

A. They just — the steamboat inspectors came down aboard it right here in Portland, Oregon, [196] and they said it's all right to let Mr. Farley sail as first assistant because he has been going to sea quite awhile. And I went out as first assistant.

Q. Well, generally, have you worked all twelve months each year, Mr. Farley?

A. Not all twelve months in every year, no. I have worked ten months, eleven months.

Q. On the average, ten to eleven months would be about the right amount that you worked each year?

A. Well, in 1950 I didn't work at all except a few night watches here in Portland, Oregon. I stayed home and built myself a home.

Q. Yes?

A. And that's the only time that I was off the ship for any length of time like that. It shows right in my book.

Q. That's the only time you were off for a

(Testimony of John Farley.)

whole year. But, what I was asking you is whether on the average ten to eleven months was about as much as you worked each year?

A. Well, that's—you could say that. On some ships I have stayed on for quite awhile, you know, fifteen months, two years. I have stayed on ships two years.

Q. Yes. Well, you have mentioned it yourself that generally you worked ten to eleven months a year?

A. I worked till the ship ties off. I don't get off the ship, I stay with the ship. And, when the ship [197] ties up then I have to get off and come home. That's how I come off a lot of ships and come home.

Q. All right. But, what we are trying to get at is how much of the year on the average did you work?

A. I'd say about ten, eleven months. Ten months. Put it ten months a year and following it right on through it will come out all right like that. I know I worked that much, anyway.

Q. All right. What do you weigh today, Mr. Farley? What is your weight now?

A. About 192 pounds.

Q. What was your weight at the time of the accident?

A. I suppose about 190 pounds then. I don't remember. I couldn't say for sure because I don't know.

Q. You don't know what your weight was then?

(Testimony of John Farley.)

A. No, sir. I quit smoking and I started putting on some weight, I know that much.

Q. You had quite a serious illness about ten years ago, too, didn't you, Mr. Farley?

A. Ten years ago. What would that be?

Q. Did you have a serious illness about ten years ago? A. No, sir; not that I know.

Q. Well, did your weight go down to about 150 pounds? A. Oh! that.

Q. At one time? [198]

A. Yes, sir. I didn't—I was out. My weight went down, that's right. I come in on a ship and I looked like—that was in '45. I come in on a ship and if you was out where I was at and under bombs and ships going up all around you you'd lose weight too. I was first assistant on a ship and I stayed on it nineteen months and that's where I lost my weight on that ship. I looked like a skeleton. I come in, I lost the weight aboard that ship.

Q. But, you had not been ill?

A. No, sir, I wasn't in no hospital or nothing.

Q. Well, you weren't in any hospital, I know. But, the question was whether this loss in weight at that time was due to any illness or not?

A. No, I wouldn't say.

Q. Had you been sick at all?

A. No, sir; I wasn't sick.

Q. Have you at any time suffered from rheumatism?

A. I had rheumatism in my knees and I used to go up and down the ladders. When I come in on

(Testimony of John Farley.)

that trip that's when it started in in '47. I went and got some shots, Sherwood treatments and he told me if I would take Sherwood treatment if I would get three or four shots and if it would do me any good let him know. So, he give me three or four shots and I told him, "Yeah, I think it's doing my knee some good." And I took ten shots [199] and that was all I taken and I was supposed to take twelve shots and I shipped out to sea and I was gone to sea and my knees have never given me a bit of trouble since that date.

Q. Was that a doctor here in Portland that gave you the treatment for this knee trouble?

A. Yes, sir. He gave me——

Q. Who was the doctor?

A. I couldn't tell you because I don't know. They change—you know, change so often up there. I don't know who the doctor was.

Q. It was a Public Health——

A. Public Health doctor.

Q. Oh. It was a Public Health physician?

A. Yes, sir.

Q. In addition to that, any other illnesses or operations that you have had, is there anything else?

A. I have had an operation when I was working up in St. Vincent's Hospital as an operating engineer.

Q. In what year was that?

A. Maybe '40 or '41, I couldn't say now for sure what it was.

(Testimony of John Farley.)

Q. Before the last World War? Was it before the last war?

A. It was right after—right after the war. I think it was in '41, I guess. The war was on then, I think. I quit the—I quit the Charles Christensen and I came in here and went to work, stationary [200] work, for about a year and a half and then I went out to sea again. But, that's when I—I had this hernia operation. I was working with the chief engineer up in the power plant and we was fixing the air ducts up there and we was cutting a plate. So, when he cut the plate off that you lay down so the air won't get in and shut the air off on the air duct, he cut the plate and it kind of fell down and when it did I reached like that (demonstrating) and I grabbed it and I held it up and then I went outside. As I was the operating engineer on there—and I went outside and I look up at the stack to see if it was smoking which you do because they don't want no smoke in around Portland and they tell you always to watch your stack and see if it was smoking. So, I did that and when I did look at the stack this thing popped out on me right then and I put my hand down and I felt and it was a big egg stuck down below where I had this hernia operation. And I come in the power plant and they took me up to the hospital and then this Dr. Gambee, he operated on me and three or four days later he operated on me and I was—that's what happened to me there. That's the only operation I ever had.

(Testimony of John Farley.)

Q. That's the only operation you have had?

A. Yes, sir.

Q. I thought you said that happened when you sneezed?

A. That's what I told you. I went outside and [201] I looked up at the stack and when I sneezed that's when it popped it right out there.

Q. Well, then, when you looked at the stack you did sneeze?

A. Yes, sir. I looked up at the stack and I sneezed—the sun. I was on day watch there when it happened.

Q. Now, Mr. Farley, are you married or single?

A. I am married.

Q. Any children? Are you living with your wife?

A. Yes, sir.

Q. Any children?

A. She has got one boy in San Francisco.

Q. But none that are staying with you?

A. None of mine.

Q. You live on a place about how big?

A. I got three acres.

Q. How many houses on that?

A. I got five duplexes and my own home and then three or four shacks around there.

Q. That you rent out?

A. Well, I got the duplexes.

Q. You rent the duplexes out. What about the shacks, are they rented too?

A. No, sir, they're just for the——

Q. They're not houses?

(Testimony of John Farley.)

A. They're—no houses there, just shacks, little [202] chicken house and just an old—just old buildings you put stuff in and store stuff away in them.

Q. You have your own home there and you have five duplexes? A. Yes, sir.

Q. That's ten different quarters to be rented?

A. Yes, sir.

Q. Is that used as a sort of a motor court?

A. No, sir. It's rented by the month.

Q. You rent it by the month? A. Yes, sir.

Q. You don't hold out as a motor court or a motel? A. No, sir.

Q. You have your chickens, do you?

A. Yeah. I have 35 or 40 chickens.

Q. Thirty-five or forty chickens. And you look after them, do you? A. Sir?

Q. Do you look after them?

A. Yes. I carry water to them and feed them and——

Q. You don't have the water tap running right there in the chicken yard or chicken house?

A. No, sir.

Q. So, you carry the water?

A. I carry the water in a bucket to them.

Q. And you clean the chicken house out, don't you? [203]

A. Yeah. When I clean it out I clean it out in a wheelbarrow.

Q. Well, it has to be cleaned out periodically, once a week? A. Yes; once a week.

(Testimony of John Farley.)

Q. What do you use, what sort of litter, sawdust?

A. Straw.

Q. Straw?

A. Straw.

Q. When you clean it out do you use a pitchfork to shovel it out through a window?

A. I just scrape it off with a shovel. I just scrape it off the roosts and then into the wheelbarrow and then wheel the wheelbarrow out and dump the wheelbarrow out in a place where—let it mulch.

Q. The wheelbarrow—you throw it onto the wheelbarrow and wheel it out of the chicken house?

A. Yes.

Q. Now, then, you put it on a sort of a pile and after it's rotted you put it onto your garden, I suppose?

A. Well, I don't get so darn much of it from 25 or 30 chickens, I will tell you that. That's what my wife does right—

Q. Didn't you say a moment ago 35 or 40 chickens?

A. Yes, sir.

Q. Now, it's 25 or 30? [204]

A. No, I didn't say that.

Q. How many did you say?

A. I said I have about 25 or 30 chickens.

Q. Twenty-five or thirty?

A. Yes. That's right.

Q. That's about the proper number, is it?

A. Yes, sir.

Q. Now, you put this out on a pile where it was to mulch, isn't that the word you used?

(Testimony of John Farley.)

A. Yes, sir.

Q. What do you do with the mulch afterwards?

A. My wife takes it and puts it around her flowers around there.

Q. Your wife puts it in the wheelbarrow?

A. Yes, sir. She takes and puts it around the flowers.

Q. Hauls it around the garden?

A. Yes, sir.

Q. Do you have a vegetable garden too?

A. No, sir.

Q. No vegetables?

A. Well, I got no vegetable garden there.

Q. How much of an area is this lawn or grass in? How big is your lawn that you have to mow?

A. I'd say just the regular place, I'd say a good half acre in there. [205]

Q. Is in grass? A. Is in grass.

Q. What kind of a mower is it you use to mow with? A. It's a power mower.

Q. You start the engine all right, do you?

A. Yes.

Q. Is it one of these little Briggs-Stratton engines? A. That's what it is.

Q. Then you run that over about a half an acre? A. No, sir.

Q. What do you do?

A. I take and run it. I run it for about an hour and then I quit.

Q. Oh?

A. And then the next day maybe I will do

(Testimony of John Farley.)

some more, and the next day I will do some more, and keep that up until I go over it. I don't go over the whole place. I never would get to keep going over it and over it. I go over it as much as I can.

Q. Well, you don't try to mow the whole half acre in one day? A. No, sir.

Q. So, you work for about an hour?

A. That's right.

Q. In mowing? And then you probably knock off for that day? [206]

A. I take and knock off or I go in for therapy right then in the morning. I may mow for an hour and go in and take my bath and lay in the bath tub for awhile and then I go in and get my therapy and then I come back home and maybe I will start the mower up again and mow for maybe a half hour or something like that. And I lay there and I put—I got a heat lamp there and I put that on me at nighttime and my wife massages my back also besides that.

Q. Now, you tell us what you do on a typical day where you don't come in to have your physiotherapy. What time do you get up in the morning?

A. Well, I get up about nine o'clock, eight-thirty.

Q. Do you get your own breakfast or does your wife get it?

A. No, sir; my wife gets the breakfast.

Q. What do you do after that?

A. Well, I go outside and throw some mash out

(Testimony of John Farley.)

for the chickens, put it in a trough, and then I will take a little bucket of water or one of them ten-quart buckets of water, bring it out there and dump it in the mash so the chickens can eat it. And then I come in the house then and eat my breakfast and maybe I will go on out and maybe run the mower or either that or I will go out and clean around something or go in the nut house, crack nuts, just like that. I got about eighty pounds of nuts out there that I must crack. [207] I just set there with a hammer and just crack them and put them in a bucket. And I still got them out there.

Q. Those are filberts, are they not?

A. Walnuts.

Q. Oh. Walnuts. Are those walnut trees in your place? A. Yes, sir.

Q. Do you have the walnut trees on your own place? A. Yes, sir.

Q. Who picked the walnuts last fall?

A. I took and raked some of them up and picked them up myself too.

Q. Well, do you wait until they fall off of the tree before you harvest them? A. Yes, sir.

Q. You wait until they fall off?

A. Yes, sir.

Q. Then you rake them together and pick them up off the ground? A. Yes, sir.

Q. Were you able to carry a sack of eighty pounds of nuts all right? A. No, sir. No, sir.

Q. What did you do?

(Testimony of John Farley.)

A. Well, I just take and—the nuts and put them in a water bucket, pick them up in a water [208] bucket. I rake them up and—you couldn't get only about fifteen or twenty pounds of nuts. It would be a lot of nuts. And I bring them in and bring them into the nut house and my wife takes and has them in there and she dries them and then she stacks them up and I take them and crack the nuts for to sell. That's what I do.

Q. You sell the——

A. And the same way with the filbert nuts, I will rake them in a pile. Just last year I took and raked the filbert nuts in piles and got some sacks with burlap in them and I just raked them up in little piles and then I kind of laid down and picked the nuts out of the piles and put them in the bucket and then I got up and carried the bucket. I may pick about thirty pounds of walnuts or filberts in a day like that.

Q. How much of your three acres is in walnuts and filberts? A. Fourteen trees.

Q. Fourteen. That is walnuts and filberts?

A. No, sir. Fourteen trees of walnuts.

Q. Oh, yes. And how many filbert trees?

A. There is pretty near an acre of filberts.

Q. Pretty nearly an acre of them?

A. Yes.

Q. Do you sell the nut meat, do you, after you crack them? A. Yes, sir. [209]

Q. You sell the meat?

(Testimony of John Farley.)

A. My wife sells them to the bakers or somebody that happens to buy them. She sells them.

Q. Yes. Well, now, let's go on with your day there when you are not coming in for your treatment. In the morning you said you would go into the nut house perhaps and shell a few nuts setting down there. What did you do after that?

A. Very little work I do around there, I will tell you that, very little work I do.

Q. Well, just tell us what you do, Mr. Farley, and then we can tell whether it is very little.

A. Well, I just take and I lay down around in the house. I don't do very much work around there.

Q. Well, here we had gotten to about noon-time, I think, and you cracked some nuts and then about noon you go in and have your lunch, I suppose?

A. Well, I won't maybe eat until maybe two or three o'clock in the afternoon. The wife may get dinner.

Q. Two or three o'clock?

A. But, I will be maybe laying around in the house or—I don't—I don't do very much out there, I will tell you that.

Q. Yes. Now, in addition to the work that has to be done with the lawn mower, do you have to cut some grass with a sickle or scythe? [210]

A. Yes, sir.

Q. Well, do you do that work with the scythe and the sickle?

A. No, sir.

(Testimony of John Farley.)

Q. Who does it?

A. The wife will take and she takes the scythe and cuts some of that grass down.

Q. You let your wife handle the scythe?

A. Yes, sir.

Q. And——

A. She done it yesterday. I think she got—— she——

Q. Yes. Now, who keeps these ten places besides your own home in shipshape, I mean, when something has to be done around them?

A. My wife paints them and cleans them up and takes care of them. She does the work over there.

Q. Your wife paints them and cleans them up when tenants move out?

A. She does the cleaning.

Q. You don't help on that at all?

A. Very seldom I ever help over there.

Q. Just what would be wrong with your standing up against the side of one of these houses and brushing some paint onto them? How would that hurt you?

A. They need painting right now, that's what [211] they need. I couldn't do that.

Q. You haven't even tried it, though, have you?

A. I stand up and help her dry dishes and I can't stand it.

Q. You stand up and help her dry dishes?

A. Yes, sir.

Q. How long do you stand there drying the dishes?

(Testimony of John Farley.)

A. Maybe three quarters of an hour and my back will hurt.

Q. Three quarters of an hour? A. Yes.

Q. When just you and your wife have been eating there you have three quarters of an hour's worth of work?

A. Not just the eating, she is liable to have a pile of dishes on the sink or drainboard, or stuff like that, and she will get in there and wash them and I may give her a hand.

Q. Yes. Still you can go to the physiotherapy place down here and exercise there for three hours and standing up and wiping dishes after three quarters of an hour makes your back hurt, is that right?

A. When I go to physiotherapy I go in there and I lay under heat treatment.

Q. All right.

A. I lay down and take heat treatments on my back. I take that for—from one o'clock until two o'clock.

Q. All right. [212]

A. And then from two o'clock I go on and I take exercises lifting weights and then I go in and I stand on a board, or whatever he wants me to do, with my back trying to strengthen my back. I just take——

Q. You start in at two o'clock and for how long do you continue to do things on your feet while you're on your feet there?

A. I am, oh, there until three-thirty.

Q. Till three-thirty? A. Yes, sir.

(Testimony of John Farley.)

Q. Well, after you have been on your feet from two to three-thirty doing the exercises does your back hurt? A. Yes, sir.

Q. It does? A. Yes, sir.

Q. What do you do for it then?

A. All I do is just get in my car and go on home and that's—and wait and come on in again.

Q. Then you drive home and sometimes you go and mow some lawn then after that then, don't you?

A. I don't mow the lawn right then. I take and go on home and maybe I will in the evening I may take and tell her, I says, "I will go on out and mow a little grass." And she says, "All right, John."

Q. Yes. Now, Mr. Farley, have you now told us about all [213] the work that you do and all the exercising that you do? A. Yes, sir.

Q. That's about all of it? A. Yes, sir.

Q. The only time you attempted any job for which you got paid was in September, 1953?

A. Yes, sir.

Q. You have let nearly two years go by since then without trying to work another job, haven't you?

A. I been up there at therapy for the last year.

Q. Well——

A. I can't—I couldn't take and do the job, I know it my own self that I can't do the heavy work.

Q. But, you haven't tried any? You haven't tried? A. I know I can't do it.

Q. Yes. You didn't go down to take a night engi-

(Testimony of John Farley.)

neer's job on one of these ships to see how you could get through on it?

A. Ray Robinson told me if I can't do the work and open boilers and pulling wrenches and stuff that there is no use trying to get somebody else do your work.

Q. Well, are you telling us that a man that goes down there on the night relief has to pull boilers?

A. Whatever the chief engineer tells him to do you do it.

Q. That repair work is being done on the ship at nighttime [214] when she is in port here by the engineer officers?

A. You are taking water and everything else like that.

Q. Well, now, taking water is quite a different thing again. We were talking about pulling boilers.

A. If they ask you to open up them manhole plates you're going to have a boiler inspection or something they will ask you to do it and you will do it.

Q. As a relief engineer you have never done it, though, have you? As a night engineer have you ever done that kind of work?

A. Yeah, I have done that work.

Q. As a night engineer relieving for just a night?

A. No, I didn't take and do that.

Q. No.

A. No. But, I have worked on board keeping up an engine and stuff.

Q. Now, except for minor adjustments there are

(Testimony of John Farley.)

no—the engineers don't do any repair work on the ships, do they?

A. You mean the engineer aboard?

Q. Aboard. A. Yes, sir.

Q. While the vessel is in port in Portland?

A. Yes, sir.

Q. What sort of repair work do they do?

A. Put in rings. [215]

Q. Into what?

A. Into pistons or in the valve stems.

Q. On steam vessels?

A. Yes, sir. Reciprocating-engine jobs.

Q. You have done that, have you?

A. Right. From the Trans-Oceanic right on the ship down there I have put in—put in stuff while I was on night watches.

Q. Who makes the major repairs on the ships' engines, is that done by shore crews or not?

A. Sometimes it's done by shore crews and sometimes it's done by the crew aboard a ship. It depends on how big the job is.

Q. Yes. Now, you put in the night in September, 1952, on that relief job, though, didn't you?

A. Yes, sir.

Mr. Williams: I believe counsel means '53.

Mr. Krause: Yes.

Q. September, 1953? A. Yes, sir.

Q. You put in the night? A. Yes, sir.

Q. How many hours?

A. I put in eight hours down there. I laid down, though. I couldn't take it. [216]

(Testimony of John Farley.)

Q. During those eight hours you laid down?

A. Yes, sir.

Q. And you didn't go back the following night?

A. No, sir. The ship sailed next morning.

Q. So, that job ended then?

A. That job ended.

Q. Now, actually, you did apply to Ray Robinson for his sending you down onto another job, didn't you?

A. I wanted to get to work again and I told him what happened and he said if I can't do the work, John, there is no use going down there.

Q. But, you did tell Robinson you wanted to be sent out again? A. Yeah, I did.

Q. And you haven't improved sufficiently since that date so that you even wanted to try another job?

A. I would like to try the job but I just—I know I can't do the work.

Q. Yes. Well, you know you can't do the work without trying?

A. Yeah, I know that. I'd like to do it. That's what I am taking therapy—I thought I'd get my back in shape that I could go, could be able to go back on ships. I don't like this laying on shore here. I like to go to sea.

Q. Well, Mr. Farley, you did manage to [217] get through the night in 1953 on this job and you made some improvement since then, haven't you?

A. On my arm, yes, sir.

Q. On your back too?

(Testimony of John Farley.)

A. Well, I don't know. My back still hurts me, I don't know. My arm——

Q. Your back still hurts you?

A. Yes, sir. My back still hurts me.

Q. It hasn't improved any?

A. I don't know. I don't know. It just hurts me just the same. I don't know.

Q. So, at any rate, there has certainly not been enough improvement in order to get you to go and try another job anyway. You haven't improved that much that you wanted to try another job?

A. I would like to try another job if you would give it to me.

Q. Well, have you asked him for a job?

A. I asked Ray Robinson when he called me up that time and he told me about it and he says, "John," he says, "can't send you down there if you can't do the work."

Q. Well, that was in September, 1952?

A. Yes. That's right.

Q. '53? A. '53. [218]

Q. Pardon me again. '53. Now, nearly two years have gone by but you didn't ask Mr. Robinson to send you out on another job?

A. No, sir. I been taking therapy, see, and if I can get well that's what I can—can't——

Q. Now, Mr. Farley, the Augustin Daly arrived in Sasebo about April 2, 1952, didn't she?

A. Yes, sir.

Q. Then the first time you went ashore was on the night of the 5th? A. That's right.

(Testimony of John Farley.)

Q. 5th of April. And you said you went ashore right after supper about six o'clock?

A. That's right. Or five o'clock, I guess, when they have supper. I went ashore right after—right after chow, anyway.

Q. Yes. And, did you go ashore alone or with somebody?

A. I went ashore with Morgan.

Q. With Morgan. He was an oiler, was he?

A. He was an oiler.

Q. Oiler. It's customary for the licensed officers to go ashore with the men that way, isn't it?

A. There is no law stopping it. You can go ashore with them.

Q. Well, I say, it's customary?

A. Well—— [219]

Q. Then you and he when you got ashore went and had a drink together?

A. Yes, sir.

Q. Now, did you have this first drink before you had your haircut or afterwards?

A. I think I had my first drink right when I stopped at that little bar and then we left and I went in to get my haircut and then he went across the street and I went over there and met him and had a drink over there with him. When I went over there I had a drink with him and that's—and then we left and went uptown.

Q. Now, this first one was in this bar right on the dock or near the dock, was it?

A. That's right.

Q. What did you drink in there?

A. A beer.

(Testimony of John Farley.)

Q. What kind of beer? A. Just——

Q. American or——

A. Just that Japanese Ashai beer.

Q. Japanese beer?

A. Yeah, that's right.

Q. Was it a quart bottle or what size bottle?

A. It was a quart bottle. It was poured in between both of us, that's right. [220]

Q. That is, you shared a quart bottle?

A. Yes, sir. That's right.

Q. The second time what did you have to drink after your haircut? A. I had a beer too.

Q. Well—— A. Same way.

Q. ——did you drink the whole quart yourself that time?

A. I don't know. I guess I had a bottle of beer all right. They're not——they're just the fifths. I set there. Yes, I guess so. Yes.

Q. A fifth of beer? A. Yes, that's right.

Q. So, what time was it then approximately?

A. I'd say, oh, it could have been around seven, seven-thirty, or something like that.

Q. Then you went uptown to see the Cherry Blossom Festival? A. That's right.

Q. When did you start back to the dock again then?

A. About eleven o'clock we started back to the ship. We walked back, we didn't take a cab or ricksha or anything, we just walked back and when we got back to this one spot where Morgan wanted to go to, why, I wouldn't go in there because he wanted

(Testimony of John Farley.)

just to go in and see that Jap gal so I said, "Well, I will see you down at that other place because I'm going [221] to buy some other stuff." So he stayed in that other place. And about a quarter to twelve he must have been—he left that other place. I suppose that's about the time. It only took about two minutes to walk over there and I went around the corner and bought a couple of kimonos and came back in this barroom where these fellows were in there and I got my stuff and I says, "Well," I says, "about time for the launch," and I gathered up my stuff and I went out of there. And maybe somebody's liable to say "Here, take this," and hand you a glass of beer, or something like that, that they had poured out and maybe I took the glass from the guy and took a little bit of it.

Q. Yes. So that is besides these other two drinks that you had, just before you left to go out to the launch you had another one?

A. I wouldn't doubt. Maybe I did.

Q. Well, was that whisky or beer again?

A. Beer.

Q. Yes. And, by the way, when you first came ashore and in this little tavern on the dock you saw these colored boys from the steward's department drinking there at the time, too, didn't you?

A. They weren't in there.

Q. This man that later on fell on you?

A. They were in there when I came back [222] at eleven o'clock that night, that's where they were at.

(Testimony of John Farley.)

Q. Oh. At eleven o'clock you saw them in there?

A. Yes, sir.

Q. They were drinking then, weren't they?

A. They were settin' over on the table over there.

I guess that's what they were in there. They was drinking and fooling around with the Jap women.

Q. What were they drinking, do you know?

A. I don't know.

Q. Yes. So, then, it was about midnight when you got down to the landing, I suppose?

A. Yes, sir.

Q. Was the launch there when you got down to the landing?

A. Yes, sir.

Q. You got right aboard?

A. Yes, sir, I come right aboard and walked over and got on the launch.

Q. When you finally left the dock there you had somewhere around twelve or fifteen men on the launch?

A. That's right.

Q. You said that there were only eight or ten in the launch when you went ashore?

A. Well, the men go ashore and—the men go ashore at different hours and some of them don't come back until the last launch. Some of the fellows go ashore at twelve o'clock [223] and they don't come back until the last launch.

Q. So, that—

A. They're filled all up. The fellows go ashore during the day, why, some of them picks up other launches, waves at other launches going by the ship and they come on over and pick them up and they

(Testimony of John Farley.)

will go ashore. And then when the ship—when the motorboat leaves there—otherwise it would cost you quite a bit of money to get back to the ship if you pay it out of your own pocket when that launch goes.

Q. So, you take the free launch provided by the ship? A. That's right.

Q. All right. Now, when you got there to the Augustin Daly about where did the launch put up against the side of the ship?

A. Pulled up midship.

Q. Right about in the way of the bridge and the midships house?

A. Just where they had the ladders at.

Q. Well, I know. But that was where the midships house is located—— A. Yes.

Q. ——wasn't it? Was the ladder, do you recall where it was with respect to that midships house? Was it forward or aft or about in the middle?

A. It was aft of the midships house. [224]

Q. Toward the after end of the midship house?

A. Yes, sir.

Q. And did you see what sort of cargo work was being carried on as you came alongside the ship?

A. I didn't see no cargo being worked at all when I pulled alongside.

Q. You didn't see whether there was work still going on the ship? A. No, sir.

Q. Were the cargo lights burning on the ship?

A. They had the lights.

Q. At the time you came alongside?

(Testimony of John Farley.)

A. They had the lights up on the ship because when I come back in the motorboat and it went on up and circled around I took a look over and I said, "Well, there she is" and that's what I said there. Harry Morgan—we was sittin' there, I said, "Well, there she is."

Q. Well, are you not telling me that you saw the cargo lights or you didn't see them?

A. I saw lights that they had, mast lights and everything on the ship.

Q. Well——

A. They had the lights burning.

Q. You do know what cargo lights are?

A. Yes, I do. [225]

Q. Were those burning or weren't they burning?

A. I couldn't say.

Q. You don't know. Now, what lights did you see about the ladder, the Jacob's ladder?

A. Well, I will tell you, when I come aboard they have a light up above and you take it for granted that just the light is right there at the housing of the boat up above. You can see just the light shining out from the cluster light.

Q. That is at the corner of the boat deck?

A. On the corner of the boat deck up above.

Q. Above the ladder?

A. And they have underneath there at the time, I think, too they had them tied down both ways.

Q. Two ways, one forward——

A. I know one light was there right up above, I know that for sure.

(Testimony of John Farley.)

Q. You know that there was one cluster light there?

A. Yeah. There was one light up above.

Q. Can you tell us how many globes there were in that cluster light?

A. No, I could not. They have about five or six globes but then I don't know if they had that Mogul. They have a Mogul light too.

Q. A great big globe?

A. A great big light too. [226]

Q. I thought that you had said yesterday that there was about seven or eight hundred watts of light at the ladder. Did you?

A. No, sir, I never said that.

Q. You don't know whether they had a big globe in that cluster or whether there were four or five small ones, is that right?

A. No, sir.

Q. You had gone down this pilot ladder when you left for shore, had you not?

A. Yes, sir.

Q. When you came back you saw that the pilot ladder was still there in the same place?

A. I presume it was.

Q. Well, what did you see?

A. Men had to go aboard. I didn't—I didn't—like I told you, I was just sitting down back there when the boat pulled up alongside. I just got up and says, "Well, let's get going," and I walked on up toward the midships house and was going to get ready to get aboard when my turn come. I was in no hurry to get aboard. And I just stood there and

(Testimony of John Farley.)

when this man fell on me that's how quick it was done.

Q. Well, now, when you walked along the launch—— A. Yes.

Q. ——did you walk in the direction of the Jacob's ladder? [227] A. Yes, sir.

Q. Because you knew that you were going to climb a ladder, didn't you?

A. I walked in the direction coming up towards the Jacob's ladder. The Jacob's ladder was on the side. Here is the Jacob's ladder here (witness demonstrates) and I am over here (indicating), I just walk up alongside and there is a space in between the launch that wide (indicating).

Q. Yes?

A. And you just walk up by that house. You know, that deck is covered over there.

Q. All right. You were in the stern sitting on this hatch—— A. Yes.

Q. ——when you got there? A. Yes, sir.

Q. And that hatch was how many feet from the place where the ladder was hanging down?

A. Oh, I should judge maybe ten feet.

Q. Ten feet? A. Ten feet.

Q. So, you walked along the side of the vessel of this launch? A. Yes, sir.

Q. Did you walk between the launch and the Augustin?

A. Yes, that's right. I walked between the launch and the Augustin Daly. [228]

(Testimony of John Farley.)

Q. All right. And you walked up there toward the ladder? A. Yes, sir.

Q. Then you stopped up there at some point near the foot of the ladder?

A. No, sir. I walked up there and stood at the foot of that little house that's on the little boat. I was right opposite of the little house there and I stood there talking to Mr. Morgan when this all happened. This all happened right that quick (witness snaps fingers), that's all.

Q. How close to the foot of the ladder were you standing?

A. I was about five feet away from the side of the ship.

Q. From the side of the ship? A. Yes, sir.

Q. That still doesn't tell us how close you were to the foot of the ladder.

A. I don't know how far I was. I know the ladder—I know the ladder was in that vicinity where I was standing, close in there, anyway, because the men were getting aboard the ship.

Q. Well, now, yesterday didn't you tell us that you were standing five feet from the foot of the ladder?

A. I was standing five feet from the side of the ship and the side of the ship is maybe where the ladder is.

Q. Well, is that the same thing then that you were standing five feet from the foot of the ladder?

A. I would still contend maybe that would be right if you want to put it that way.

(Testimony of John Farley.)

Q. Five feet from the foot of the ladder?

A. Yes, sir.

Q. When your deposition was taken do you remember what your best estimate was at that time?

A. No, I don't.

Q. Was it four feet from the foot of the ladder?

A. I don't know. Four or five feet, I'd say.

Q. Yes. Well, that's what I'm getting at, see. If it's not five feet that you were from the foot of the ladder it would be less than that rather than more, wouldn't it, because it would be four or five feet in your best estimate? A. That would be right.

Q. Yes. Now, Mr. Farley, did you have your packages under your arms at that time?

A. Yes, sir.

Q. Were you going to climb this pilot's ladder carrying your packages? A. Yes, sir.

Q. You were not going to send them up on a heaving line? A. No, sir.

Q. Well, then, going up a pilot's ladder carrying anything is, in your view, not a dangerous thing is it?

A. It's dangerous all right. [230]

Q. Well, you were going to do it yourself?

A. I was. Yes, I would have done it. I would have tried it, anyway. I would have went up or tried it.

Q. Yes. A. And so——

Q. They have them tied up. They have them tied up with this stuff that they have over there like bamboo, you know. They make your packages fast

(Testimony of John Farley.)

and they put a little handle on it and you throw it over your arm and you have your arm and the package hanging down on your arm and then go up the ladder that way (witness demonstrates).

Q. Did you have more than one package, Mr. Farley?

A. I had two or three packages. I had a doll and some kimonos and stuff.

Q. Were they all done up that way so you could hang them over your arm? A. Yes.

Q. They were all done up that way so you could strip them down on your arm?

A. I had gotten them up that way. They had that bamboo stuff on them, I know that.

Q. Well, now, Mr. Farley, what do you tell us now as to whether or not it's dangerous to go up the ladder when either of your hands are encumbered? I mean, when you don't have both hands free? [231]

A. I don't know. I don't get what you mean.

Q. Well, let me withdraw that question. You said a moment earlier that it was dangerous to carry packages going up the ladder, didn't you?

A. I said it was dangerous.

Q. Didn't you say it was dangerous to carry packages when you are climbing a pilot's ladder?

A. Well, it's hard to climb a Jacob's ladder with packages, I will tell you that, yes. If you had a big package it would be dangerous.

Q. Well, with the packages that you had was that dangerous to climb it that way?

(Testimony of John Farley.)

A. I never give it any thought.

Q. You never gave it a thought. Now, you did not look to see how any of the other men were climbing the Jacob's ladder, did you?

A. No, sir.

Q. When you got there you stood in the place that you have told us without looking to see whether anybody was going up the ladder and in what shape he was going up?

A. That's right, I didn't. I didn't pay any attention to who was going up the ladder or who fell, I don't know.

Q. Now, is it regarded as a dangerous place to stand at the foot of a ladder while other men are going up the ladder?

A. Well, you have got to stay on the launch some place [232] when you are up there amidships and there is maybe ten or fifteen—or ten men or eight men or seven men around there, you have got to stand some place close there.

Q. Mr. Farley, you told us that you walked about ten feet from the stern of the vessel to get to that point, didn't you?

A. I did.

Q. Was there anything to have prevented you from staying there where you had been sitting till the rest of the men had gone up?

A. No, there would have been nothing to stop me but, then, I didn't think it was that dangerous.

Q. Well, all right. What I wanted to know, is it regarded as a dangerous place to stand at the foot

(Testimony of John Farley.)

of a pilot's ladder under the circumstances that you have described to us?

A. Five feet away from there, I don't think it—I don't know where else I could stand.

Q. Well, you could have stood ten feet farther back on the ship if you had wanted to?

A. I was getting—I was coming up to go aboard of the ship. I just walked up. I never give it any thought at all. I just walked on up there. I never saw a man fall off a ladder before in my life. Never figured on anybody falling off.

Q. All right. Now, Mr. Farley, I will ask you now, do you [233] know now, consider that a dangerous place to stand under the circumstances that you had there that night?

A. Well, in that way, yes, I would look out the next time if I was ever aboard a ship.

Q. The next time you wouldn't do it?

A. The next time I'd stay clear. I'd try to wait till the last one. I'd stay back in the back.

Q. Well, now, you weren't interested in how these other men were climbing the ladder at all ahead of you, were you?

A. No, sir. I just—they got up the ladder.

Q. You weren't concerned about whether they were sober, whether they were trying to carry some packages up with them, whether they were traveling on that ladder in a careful fashion, you weren't interested in that, were you?

A. I wasn't interested in how they got up or——

Q. No. Had any——

(Testimony of John Farley.)

A. If they went up I suppose they would get down.

Q. Had you observed that any of the men had been drinking more than they perhaps should have?

A. No, sir, I did not.

Q. That is, the way they acted in the boat going over there, none of them appeared to be intoxicated?

A. I didn't—I will tell you, I didn't pay any attention to them in the boat at all because they were up forward and I was aft. I don't mingle with them guys, anyway. I stay [234] with the black gang. That was with Morgan and he is in the black gang. I don't stay with the niggers.

Q. That wasn't the answer to my question. I asked you whether you noticed any of the men were intoxicated?

A. No, sir, I did not.

Q. You did not. A. No.

Q. Did you notice that any of the men were carrying packages?

A. I never even noticed that.

Q. All you did notice was that you had some packages?

A. I had packages.

Q. Well, you knew that Morgan had been buying stuff along with you?

A. Yes.

Q. So, therefore, he must have had some packages?

A. He had packages. He had packages with him.

Q. Yes. A. That's right, he had packages.

Q. You hadn't seen any of the other fellows buying any stuff or carrying any packages?

(Testimony of John Farley.)

A. No, sir.

Q. Was there any noise there at the time of the ship's winches operating as you just arrived alongside of the ship?

A. I never heard any winches. [235]

Q. You didn't hear it. As far as you can recall it was all quiet?

A. I thought the cargo was off the ship, that's what I thought.

Q. You thought the cargo had been completed?

A. Yes.

Q. At any rate, you don't recall any noise at all——

A. No, sir.

Q. ——that would have prevented your hearing?

A. My hearing is good but I didn't hear any noise.

Q. You didn't hear someone yell a warning that a man was falling off of the ladder?

A. No, sir. I suppose by the time that noise of that hollering got to me I was knocked down. I suppose that's how quick it would happen. I never heard it.

Q. Do you recall whether there was anybody between you and the ladder at the time that you got knocked down?

A. Morgan was right ahead of me right standing this way (witness demonstrates) right from me. I was standing this way (witness demonstrates) just like I was standing—just like I am *not* and Morgan was standing here (indicating) and here

(Testimony of John Farley.)

(indicating) is the passageway to the launch. He was standing right close to the passageway closer than I was to the ladder.

Q. Well, he was standing closer to the ship, anyway?

A. He was standing closer to the ship, yes, sir. [236]

Q. Then, the distance from him to the ladder would be less than from the ladder to you?

A. Yes, sir.

Q. Where was Pattox standing?

A. I don't know. Pattox must have been behind or some place. I don't know where Pattox actually was. He must have been behind me or something like that. I don't know. I couldn't say.

Q. You had been under the treatment of Dr. Kimberley in connection with the Public Health Service, hadn't you, Mr. Farley?

A. I will tell you, when I was up to the Public Health Service they sent me over to Dr. Kimberley to be examined and when I got over there he examined my back and I brought the X-ray pictures over to him and I never know what they say, I will tell you that. They send a letter back to the U. S. Public Health Service and then later on the company called me up again and asked me to come in and go before Dr. Kimberley again to be re-examined. So, I went over and he taken some X-ray pictures of me but he recommended that I have a brace and then—but I never got the brace. I had a

(Testimony of John Farley.)

brace but I never received any brace but Dr. Kimberley recommended a brace for my back.

Q. A different kind of brace than you already had?

A. Yes, sir, a different kind of brace than I already had. [237]

Q. Then, who advised you that you go to Dr. Berg?

A. Ernie Langley. His wife, she has got her back hurt and she told me that Dr. Berg was a good doctor and you go to him, John, and he will help you out. So, I went to him and he is the one that recommended me to go and take therapy treatment.

Q. Well, did Dr. Kimberley say that there was nothing more that would be done for you?

A. Dr. Kimberley recommended a brace for me and he told them up there that in the letter, whatever letter he give them. I don't know what he says. I couldn't tell you one thing what Dr. Kimberley says. He don't tell me nothing but he just sent me back to the U. S. Public Health and I stayed there and I was taking treatments at the U. S. Public Health Service three days a week every Monday, Wednesday, and Friday from the Public Health.

Q. Was that before you finally went back to Seattle for the final trip to the Marine Hospital?

A. No, sir. I saw him after that.

Q. You saw Kimberley after that?

A. I saw Kimberley after that.

Q. Well, that's what I'm trying to get at. Did

(Testimony of John Farley.)

Kimberley tell you not to come back to him any more or did you just not go back to him any more?

A. Kimberley was sent—I was sent from Kimberley from [238] one of the—from one of the men up in the office that called—called me up at my home out in Reedville, Oregon——

Q. Yes?

A. ——and told me to come on into their office, that they wanted to send me to a doctor. And when they did that, why, I just took and called up Leonard Alley and told him that the company had called me and they wanted to send me to a doctor and I am telling him what they told me and he told me that he would take and talk to the office. And he talked to the office and called me back and told me that I had an appointment with Dr. Kimberley such and such a date and that's when I went. And what the report was I couldn't tell you.

Q. And that was the last time you went to him?

A. That was the last time I went to him.

Mr. Krause: Very well. I think that's all.

The Court: Redirect?

Mr. Williams: I have no further examination.

The Court: That is all, sir. I just have one question.

Q. Mr. Krause made reference to the colored fellows. Now, I want to make sure I understand. Was Malcomb Edward Potts——

A. He was the steward department which is a colored man.

Q. I see. Now, when you were there in the tav-

(Testimony of John Farley.)

ern or bar, whatever it was, on the dock just before you went back to the liberty launch, was Potts there? [239]

A. Yes, sir. Potts.

Q. Did you see him?

A. I saw the colored boys all in a little table by themselves. They was drinking in there.

Q. Did you know Potts?

A. Yes, sir, I know Potts. I saw him on board the ship many a time.

Q. Did you see him there drinking that night?

A. He was in there drinking in there. They had drinks in front of them. I never saw him raise a glass to his face, or anything like that, but I presume they were drinking all right.

Q. Did you see him stand at any time? Did he stand while you were there?

A. I never noticed.

The Court: Any further questions? That is all, sir. You may step down.

How long will the testimony of Dr. Berg be?

Mr. Williams: I think I would judge about twenty minutes.

The Court: Well, maybe we had better take a break now.

(Recess taken.)

Mr. Williams: Call Dr. Berg. [240]

RICHARD F. BERG

produced as a witness on behalf of the libelant, being first duly sworn by the Clerk, was examined, and testified as follows:

(Testimony of Richard F. Berg.)

Direct Examination

Q. (By Mr. Williams): Your name is Dr. Richard F. Berg? A. Yes.

Q. You are a physician and surgeon in this area? A. Yes.

Q. You practice in Portland, Oregon, Doctor? A. Yes.

Q. For how long have you practiced?

A. Oh, I have practiced since the latter part of 1930 in Portland.

Mr. Krause: We will concede the Doctor's qualifications, your Honor.

The Court: Is that satisfactory?

Mr. Williams: Oh, I always like to put them in, your Honor.

The Court: Very well. You may.

Q. (By Mr. Williams): Doctor, following your training in medical school where did you take your internship and such residency as you have taken?

A. I had my internship at St. Vincent's Hospital in Portland, interned at the Carney Hospital in Boston for one [241] year in the orthopedic service, eighteen months as resident surgeon at the Boston City Hospital in the orthopedic service, one year at the Hospital for Special Surgery in New York City in orthopedics.

Q. Do you do predominantly orthopedic work at this time? A. That's all.

Q. That's all you do? Your practice is limited to orthopedics? A. Yes.

(Testimony of Richard F. Berg.)

Q. When did you first see the libelant in this case, Mr. John Farley?

A. I saw him on the 21st of July of 1954.

Q. When he reported to you what were his chief complaints, if you recall?

A. At the time he reported to me he was complaining chiefly of pain, disability, and loss of motion, in the right shoulder, and pain and disability in his back, chiefly at the lower dorsal and the upper lumbar level.

Q. What did your examination of him show?

A. Well, examination showed marked limitation of rotation both the internal type and the external type of his right shoulder (indicating). He could only abduct the shoulder to about eighty degrees beyond which he complained of severe pain and discomfort.

Q. Abduction is a movement directly—— [242]

A. From the side of the body.

Q. ——from the side of the body?

A. From the side of the body upwards. His back motions were limited in all directions both forward, lateral, and backward movements together with a marked restriction in rotation to the right or left of the spine.

His points of maximum tenderness were in the lower dorsal and upper lumbar sections of his back although he did have some local tenderness on pressure at the lumbo-sacral level which is the lower part of the lumbar back.

Q. Were X-rays—did you order X-rays taken of him?

A. Yes.

(Testimony of Richard F. Berg.)

Q. Do you have those X-rays with you, Doctor?

A. Yes, I do.

Q. Yes. Will you put them in the viewer and indicate to the Court what your findings were therefrom?

The Court: Are they reserved a number in the list of exhibits?

Mr. Williams: This is under Number 2, your Honor, doctor's office records and X-rays of libelant.

The Court: Have they been marked as yet?

Mr. Williams: I believe they have not been marked. They should be Number 2.

The Clerk: Libelant's Exhibits 2-A, 2-B, 2-C.

(Whereupon X-rays were marked Libelant's [243] Exhibits 2-A, 2-B, 2-C for identification.)

The Court: Any objection to these?

Mr. Krause: We have none.

The Court: They will be received.

(Whereupon Libelant's Exhibits 2-A, 2-B, 2-C previously marked for identification were thereupon received in evidence.)

The Witness: This X-ray is a lateral view taken on the 1st of July of '54 in the case of Mr. John Farley, as are all of these, and the number is 2-A. I believe you said '51. No, 2-B. This is it taken from the right side in the lower dorsal area showing the compression in the seventh and eighth dorsal vertebrae which are fairly well healed at this time.

The Court: May I interrupt, Doctor. If counsel wish you may come closer to view the X-rays.

Mr. Krause: Thank you.

(Testimony of Richard F. Berg.)

The Witness: Seven and eight, as I pointed out here (indicating). He has, in addition, of course, quite a marked amount of pre-existing osteoarthritis on the edges of these vertebrae. All right.

This is a picture taken from the left side in the upper part of the dorsal region. It shows no further [244] fractures that we can see at this time.

The next one is a view of the lumbar spine showing the twelfth dorsal which is compressed and, in our opinion, was the site of a previous compression fracture. The first to the fifth lumbar show no definite fractures with some arthritic spurring. This is a spot plate taken across the twelfth lumbar—twelfth dorsal, rather, showing the compression of that vertebra in comparison to the others.

Q. (By Mr. Williams): Doctor, are you indicating generally a wedging?

A. Wedging of the vertebra in comparison to the normal contours below.

Q. Which side of the picture is the inside of the body?

A. The inside is right here (indicating). You notice the marked concavity compared to the smooth cavity of the normal vertebral body. An X-ray taken at the lumbo-sacral level on account of his pain there discloses no fractures but considerable arthritis developing in his back. This is the hip looking from the side.

Q. Are the lumbo-sacral articulations to be seen in that film?

A. Yes. The right side which was all right. Just

(Testimony of Richard F. Berg.)

another view from the opposite side of the dorsal vertebra showing our compression of our seventh and eighth dorsals. [245]

This is a picture taken to the pelvis showing both hip joints, pelvic structure, the lumbo-sacral articulation from the front view, and no evidence of fracture in this area that I could see. He has considerable arthritis both at the hip, the sacroiliac joint on both sides, and in the lumbar vertebra.

The front view taken through the dorsal spine reveals normal aeration in the lungs and normal heart shadow, arthritis in the edges of the dorsal vertebra, the fractures of the seventh and eighth, and considerable wedging of the twelfth. I think that's all on that one.

This is a picture taken at the lumbo-dorsal level showing the first lumbar with the twelfth just above it, marked arthritis in this area (indicating).

Q. Which area is that that you were indicating?

A. In the region of the—let's see—one, two—between two and three.

Q. Lumbar?

A. On the right side. X-rays taken of the shoulder—right shoulder show the old injury to the end of his clavicle, fracture through there which is healed (indicating) with arthritis in the acromioclavicular joint. And aside from that very little.

This is a different view taken with the arm rotated (demonstrating) showing a similar situation.

Now, the 2-C exhibits were taken by me at my direction on the 12th of April of 1955 almost about

(Testimony of Richard F. Berg.)

ten months later. Now, this shows our right shoulder again blown up for clarity, shows the old fracture at the distal end completely healed with the arthritis in this acromioclavicular joint. The straight anterior-posterior view of the right shoulder showing the old deformity of the clavicle. But, aside from a little arthritis in the lower portion of the shoulder joint the picture shows no definite change. The dorsal spine shows the narrowing of the seventh and the eighth, the twelfth, and a little area which we noted on the subsequent films which might have been a slight, either an arthritic spur or slight compression of the edge of the tenth. Marked arthritis is still present throughout his dorsal spine. The anterior-posterior view of the dorsal spine shows the same deformity without very much change from the previous pictures a year ago. Still present, the fractures in the seventh and the eighth, twelfth.

Q. Do you notice anything in the fourth dorsal in that film, Doctor?

A. Well, this is the fourth dorsal (indicating) and there is kind of a distortion in the shape of that vertebra at the present time. Whether or not that's a fracture that may have been overlooked or not I can't say at this time. That certainly is compression.

Q. Would earlier films assist you? [247]

A. They might if you had some and there wasn't that same deformity in them.

Q. No. I mean, films nearer the date of injury?

(Testimony of Richard F. Berg.)

A. Yes, that's what I mean. They might very definitely. This is taken in the lumbar region again, the tenth dorsal is still compressed but completely healed, and the arthritis is still present throughout the lumbar spine. Lumbo-sacral junction shows no further change other than the arthritis which was previously mentioned.

Here is another view of the shoulder showing no change from the previous.

This is a front view through the lumbar spine showing no appreciable change, still the marked arthritis between two and three previously mentioned. The arthritis in the sacroiliac (indicating) and the narrowing of the hip joints with arthritis. The upper dorsal spine shows the same general configuration as the previously shown ones.

Mr. Williams: Mr. Krause, would you mind introducing the hospital records which you have from the Public Health Service which contain the X-rays so that the doctor may examine them?

Mr. Krause: Yes, I will be glad to introduce them. The Public Health Service records and also the X-rays.

The Court: Number 4 and 5.

Mr. Williams: The X-rays are 4 and the other ones are 5? [248]

Mr. Krause: Yes.

Mr. Williams: The X-rays are 4, are they not?

The Court: The X-rays are 4, yes. Are those received without objection?

Mr. Williams: Yes, they are.

(Testimony of Richard F. Berg.)

The Court: They will be received.

(Whereupon X-rays as Respondent's Exhibit 4 and Public Health Service records as Respondent's Exhibit 5 were marked for identification and received in evidence.)

The Witness: This picture was taken in—on the 15th of July of 1953, is a side view showing the dorsal spine, seventh and eighth are compressed and six, five, four, still shows the same amount of arthritis spurring in here (indicating).

Q. (By Mr. Williams): Do you notice anything on the tenth from that film? Can you observe——

A. Well, let's see—eight, nine, ten. No, I don't see anything that looks like anything. There is no distortion that I can see there.

Q. Yes?

A. This is a front view taken on the 14th of July of '53, U. S. Public Health Service Hospital. It shows the seventh and the eighth and also the same slight deformity in this [249] view of the fourth.

The Court: Doctor, do you see any fracture in the seventh or eighth that you referred to?

The Witness: Well, yes. You see the compression mashed down.

The Court: I see.

The Witness: You can very seldom ever see a fracture line. It's just a compression.

The Court: I understand.

(Testimony of Richard F. Berg.)

Q. (By Mr. Williams): Does the twelfth show in that film or is it off to the bottom there?

A. Well, it's right here (indicating). It doesn't show very much.

Q. A side view would be necessary to show the wedging of it?

A. Yes, that's right. Can't see it from the front. There is your lumbar spine, front view, taken in '53 of the fourteenth and it shows the same arthritis I pointed out.

Here is your side view. Here is your twelfth. Now, right there it shows the wedging of the twelfth.

Q. The wedging on the anterior surface?

A. On the anterior.

Q. Yes.

A. And then your lumbar come down. [250]
Do you have any before these of '53?

Mr. Williams: The U. S. Public Health Service has the '52 ones. I don't know, they were in the safe, I might say, and I examined them with the Doctor about three days ago. As to whether they have been sent up, I don't know.

Mr. Krause: In what safe? Where?

Mr. Williams: On the second floor of this building.

The Witness: January of '52. These are of the lumbar spine. No fractures that I can see in there.

This is the shoulder in '53, the old deformity, the deformity of the clavicle.

Here is one in '52 on the 12th of August of '52

(Testimony of Richard F. Berg.)

taken in Seattle. These show the well-advanced arthritis that I mentioned between two and three. But, no other changes. The twelfth is narrowed.

The same view to the shoulder taken in '53, the deformity of the clavicle.

August, again, of '52, same general configurations.

These are taken on June the 13th of '52. This shows the same compression, the seventh and eighth. I rather think that is an arthritic spur on the fourth dorsal there (indicating).

Q. (By Mr. Williams): Do you have a side view of that?

A. Yes. We have looked at them. They are narrowed the same way. Same proposition as there (indicating) with [251] arthritis.

Q. Down in the lumbar area?

A. Yes. And, the right hand has got a roughening of the greater multangular bone here (indicating), some roughening of the scaphoid bone too of the wrist. '52 again, twelfth dorsal narrowed, seventh and eighth. Similar view in the twelfth dorsal for the dorsal still shows deformity in '52.

Q. Is it on the right side or left side?

A. Well, let's see—this is the left side area. Here is the heart shadow (indicating) so it's on the left. That is just a general lateral view, no change.

Same thing here. This is more recent. It shows the fracture more recent. I can't see the date on it. '52. You see the recent—now, this, your Honor, is a recent fracture there (indicating).

(Testimony of Richard F. Berg.)

The Court: Yes.

The Witness: You can see that now on the twelfth.

Q. (By Mr. Williams): The shadowy area there indicates——

A. Yes. Right here (indicating).

Q. ——that it is fairly short after the particular injury?

A. Yes. It is not so far away now. These are all healed in '53.

This is the right hand again in '53 of January. It shows the roughening of these—the greater multangular [252] which is at the base of the thumb. But, I don't see any fractures in there (indicating).

This, I believe, is in '53 and again shows all those things. That is the lumbar spine and a lateral lumbar.

Q. Doctor, I am going to hand you this particular exhibit. It is not an exhibit, it is just a model, for purposes of assisting you in explaining this matter to the Court, assuming counsel has no objection.

Mr. Krause: Well, I don't know what counsel is going to do with it, whether I have any objection.

Mr. Williams: Well, I am simply going to ask the Doctor to explain certain matters with this model in hand to assist him in explaining it. It is not going to be introduced.

Mr. Krause: I haven't any objection at the moment.

The Court: All right.

(Testimony of Richard F. Berg.)

Q. (By Mr. Williams): Is that a normal spine as you view it?

A. Well, it is part of a normal spine, part of the cervical vertebra gone.

Q. The upper vertebra? A. Yes.

Q. Where is the first dorsal on that figure?

A. The first dorsal is right here (indicating).

Q. Now, Doctor, in examining those X-rays you stated, I believe, that you noticed these marked compressions of the [253] seventh and eighth dorsal vertebrae? A. Yes.

Q. Which would be those two right there (indicating)? A. These two (indicating).

Q. Now, is there a loss in body in them over-all besides the wedging?

A. No. They are just simply jammed together, compressed, so to speak.

Q. And do you notice also the wedging of the twelfth? A. Yes.

Q. You mentioned that you noticed that to a lesser extent on the tenth, is that correct?

A. Yes. That is just a little edge on the front edge.

Q. An edge off the tenth?

A. Yes. That's right.

Q. Then, you said you noticed a deformity of the fourth that you are uncertain as to whether that is—I believe the last thing you said was you thought it might be arthritic, is that correct?

A. I think that is an arthritic thing in my best judgment, yes.

(Testimony of Richard F. Berg.)

Q. Yes. Now, can you describe, if a body of a man were to fall about approximately nineteen feet and land on the head and shoulders of another man, can you describe the particular strain it would place on this spinal structure? [254]

A. Well, it would exert quite a severe strain. I mean, it would cause a compression of the whole dorsal spine and the lumbar spine, and the weakest point would probably give and compress and that is the point at which the maximum compression and strain was transmitted which in this case would be in the lower dorsal region.

Q. Would you normally expect some—that most of the force would be on the anterior side of those vertebrae?

A. Well, on account of this curve——

Q. Or, the curve?

A. ——and the mechanics it would have to be on the front side. If this was reversed so that the curve was that way (demonstrating) it would be transmitted to the back side. But, inasmuch as the normal curve of the spine is in this way the forces are transmitted in that way.

Q. I see. Now, Doctor, those projections that stick out from either side——

A. These?

Q. ——these are called transverse processes?

A. These are transverse processes.

Q. What is their function?

A. They are merely anchors for the lumbar muscles and back muscles.

Q. Muscles and ligaments and things of that

(Testimony of Richard F. Berg.)

nature? A. Yes, muscles and ligaments. [255]

Q. With a force sufficient to cause multiple compression fractures such as you have shown in the X-rays, would you anticipate that there would be damage to the muscles and soft structures that are anchored onto those transverse processes?

A. Well, muscles are rather few in this dorsal area because the rib cage comes out over here (indicating). The heavy muscles are in the lumbar region. They attach to the ribs and along the spine in that area (indicating). However, there are some muscles in the back region here, so-called backstrap or erector spinalis group which would be certainly stretched.

Q. Yes. By a force sufficient to cause——

A. That's right.

Q. ——multiple compression fractures?

A. And also all those little ligaments too here in the back that hold these joints together would be stretched and strained.

Q. Yes. In examining John Farley upon his first visit to you and upon your reading of the X-rays was it your conclusion that there had been a strain of the muscles and ligaments through the back by reason of the injury? A. Yes.

Q. And did you think that it existed at the time that you saw him? [256]

A. Yes, I did definitely.

Q. That was over two years after the accident?

A. Yes.

The Court: Do we have that date fixed as yet?

(Testimony of Richard F. Berg.)

Mr. Williams: April 6, 1952, your Honor.

The Court: No. I mean the visit of Dr. Berg?

The Witness: 21st of July, 1954, your Honor.

The Court: Thank you.

Q. (By Mr. Williams): Did you find—I think you mentioned in the X-rays the presence of arthritis in the spine. What do you mean by that, Doctor?

A. Well, arthritis is an overgrowth of bone cartilage, soft tissue, or envelopery tissue in and around joints.

Q. What is it due to generally?

A. Well, it is due, we think, to the multiplicity of insults incidence of the normal activity of active life. And, especially it is very common in heavy work—people who do heavy work. It is a penalty of the increase in years.

Q. You say it's normal incidence is the normal wear and tear of life? A. Yes, I would say so.

Q. Now, do many persons having osteoarthritis in their back have it in any other parts of their body?

A. Yes, I think a large percentage of people do.

Q. Over what age would you say? [257]

A. Oh, after they are fifty years of age.

Q. Now, in those persons who have it is it also quite frequent that the condition causes no pain or disability?

A. That is very commonly encountered.

Q. Is it also quite common that any sort of a traumatic injury, a substantial one, will cause a

(Testimony of Richard F. Berg.)

flaring up or an aggravation of that dormant arthritis?

Mr. Krause: I don't recall that there was any pleading here of an aggravation of a pre-existing condition.

Mr. Williams: That is exactly what was pleaded, though, Mr. Krause.

The Court: I didn't hear you, Mr. Williams.

Mr. Williams: It is pleaded, your Honor, oh, yes, directly and specifically. I refer to contention 3 of the pre-trial order, your Honor. I am sorry, I do not have the pages correct. But it starts on one page and goes over to the next page. It states in here "and an aggravation of a pre-existing osteoarthritis in the dorsal spine which was previously causing libelant no pain or difficulty." Do you find that, Mr. Krause?

Mr. Krause: "aggravation of a pre-existing arthritis." I am sorry, your Honor, I overlooked that.

The Court: Very well.

Mr. Williams: Would you read the question back? I think there is a question, I believe. Would you read it [258] please, Mr. Reporter?

(Last question read.)

The Witness: Yes, I think that is generally accepted in the medical world.

Q. (By Mr. Williams): Do you often find that to be true in the persons you examine? A. Yes.

Q. What is your conclusion as to Mr. Farley's present symptoms of arthritic pain if you find them?

A. Well, of course, he has improved since I saw

(Testimony of Richard F. Berg.)

him originally. He has a much better range of motion in his shoulder. He has worked there strenuously trying to improve his back movement and condition. I have assigned him to lots of extra curricular work at home, chores, and things to try to loosen him up. I have asked him to carry out exercises aimed at loosening and bending his back and, as a result of it, I think he has considerably less pain than when I first saw him.

He does, however, have the pain and stiffness to a moderate degree.

Q. Would an injury sufficient to cause multiple compression fractures just as you found in Mr. Farley normally place a strain on the lumbo-sacral articulations of the spine?

A. Yes. Because the lumbo articulation is really the fulcrum of it.

Q. Could you hold that up just a little higher, Doctor? [259]

A. Yes. The lumbo-sacral is really the fulcrum of this lever which is the spine and any stresses or strains imparted to the upper part would be directly impacted on the lumbo-sacral joints.

The Court: As I understood you, Doctor, you said the pictures appeared to be normal in that respect in regard to any injury.

The Witness: Yes, your Honor. I could see no fracture.

Q. (By Mr. Williams): What sort of an injury would you expect in that area from——

A. Well, in the absence of evidence of injury——

(Testimony of Richard F. Berg.)

of course, as you will notice these vertebrae are much heavier and stronger than those above because they are used to and subjected continuously to heavier strains, therefore they break much less easily.

Q. Yes?

A. So, what we usually expect in those cases is a strain of these ligaments in the back of the joints.

Q. That hold that process in position?

A. That's right.

Q. Did you find any other causes for pain and discomforts in the dorsal or other areas of the back upon examining Mr. Farley?

A. Well, I think the arthritis and the straining of those muscles, the very obvious compression fractures, were sufficient. I don't remember anything else that he had there. [260]

Q. No. But, what I am wondering, Doctor, is you normally get a certain amount of irritation of nerve roots from an injury of this nature?

A. Well, I think that is usually seen in any fracture case on account of the swelling.

Q. Yes?

A. The pressure on the adjacent nerve roots is a bothersome symptom. In fact, that is why we have the pain——

Q. I see.

A. ——from them is the swelling and pressure on the nerve roots. We accept that without thinking about it, mostly.

Q. What is reticulitis?

(Testimony of Richard F. Berg.)

A. Reticulitis is an irritation of a nerve root. Reticuli are the ones which come out from the—closest to the spine.

Q. I don't think we will need the exhibit any more, Doctor. You can set it down there instead of holding it so long. Upon examining Mr. Farley what did you—what course of treatment did you prescribe for him?

A. Well, I prescribed heat, massage by the physiotherapists, I prescribed that he should himself participate in this activity carrying out prescribed exercises at home, that he should make every attempt that he could to loosen the stiffness in his back and the shoulders by exercise, to do as much as he could around the house in the way of work short of lifting. Of course, I advised him to do no lifting whatsoever. [261]

Q. You consider it to be dangerous to his health if he were to lift?

A. Heavy lifting is contraindicated in these cases.

Q. Did you advise him to return to heavy work?

A. No, I have never done that.

Q. Would you advise him not to?

A. Well, I have told him he can't do heavy work.

Q. Yes. Insofar as Mr. Farley's ability to do heavy work is concerned, what do you think his condition is right now; that is to say, do you think it is still flexible or it is stationary or will get better or will get worse or what?

(Testimony of Richard F. Berg.)

A. Well, I think he has practically reached the maximum degree of improvement now.

Q. You do not expect that he will——

A. Not very much. Although I can't look into the future, I don't anticipate too much more.

Q. Do you expect that he will ever be able to do heavy work again?

A. Well, I don't think so. I don't think he should.

Q. Is it your opinion that he is totally disabled from heavy work? A. I believe so, yes.

Q. Now, you have examined Mr. Farley from time to time, Doctor, and do you find him to be in good health generally other than this disability, or what would you say that way? [262]

A. Well, I would say aside from the normal wear and tear of generalized arteriosclerosis that men have at his age who have lived a vigorous arduous life that he is in as good a condition physically as the average man.

Q. But, he has no other illnesses?

A. Not that I know of.

Q. That are compounding these difficulties that you know of? A. Not that I know of.

Q. When you examined him from time to time, Doctor, was that at your request that he keep coming back checking with you for periodic examinations?

A. Well, yes. I had him placed in the physiotherapy department for treatments there and then I tried to follow him through and advise him as to

(Testimony of Richard F. Berg.)

additional exercises from time to time and check him to see what his progress was.

Q. You have directed different exercises for him? A. Yes, that's right.

Q. Such as physical therapy and treatment over there at the—that's at the Portland Rehabilitation Center? A. That's right.

Q. And you have examined him from time to time to see what his progress was? A. Yes.

Q. And it is your opinion that he will not progress substantially more from his present condition?

A. I don't think so.

Q. Would you say it is probable that he will not?

A. Yes, I would say it is probable he will not—

Q. His condition—

A. —advance very much farther.

Q. —his condition is substantially stationary at this time? A. That's right.

Q. Do you find Mr. Farley to be a cooperative patient? A. Very.

Q. One who attempts to follow your directions?

A. Yes, indeed.

Q. Does he attempt to help himself as much as you can tell.

A. I think he has been unusually good about that because I have asked him to do as much as he can and participate actively in this treatment.

Q. Do you consider that he complains a great deal about his pain insofar as you can tell?

A. No, I don't think so. I have never felt that way about it.

(Testimony of Richard F. Berg.)

Q. You don't feel that he is inclined to exaggerate his symptoms? A. Not at all.

Q. Yes.

A. If he was he certainly wouldn't be improving as he has. [264]

Q. Doctor, in the future do you think that Mr. Farley would be able to follow some light employment of some sort? A. Yes, I do.

Q. Yes. Could he do desk work and office jobs?

A. Yes.

Q. If he were trained to do that? A. Yes.

Q. What type of employment; that is to say, the disabilities that he has, what type of employment would he be limited from doing? That is to say, for example, can he do bending easily, that sort of thing?

A. Well, he can bend within reason as long as he doesn't lift.

Q. Yes.

A. But, I would suggest the main things he should be restricted from, in my opinion, would be heavy lifting, climbing, and any work which would require a great deal of excessive muscular strain.

Q. What about considerable walking and that sort of thing?

A. Well, of course, I don't think at his age he should do too much walking anyway.

Q. What about prolonged standing?

A. Well, I don't know about that hurting him so much if he wasn't too fatigued.

Q. Yes. As far as light occupations are con-

(Testimony of Richard F. Berg.)

cerned, Doctor, [265] to what percentage do you consider Mr. Farley is disabled?

A. As far as light occupation?

Q. Yes.

A. Well, on the basis of his back and shoulder and the stiffness in his muscles attached to his back and shoulder I think he has a disability of about 50 per cent.

Q. As to light occupation? A. Yes.

Mr. Williams: You may examine. That's all.

Cross Examination

Q. (By Mr. Krause): You are now having in mind when you say a 50 per cent disability for light occupation quite a variety of light occupations, aren't you?

A. That's right as I described nothing about the strenuous ones.

Q. Well, I thought you had eliminated the strenuous already?

A. As far as I am concerned that is a total as far as he is concerned, strenuous ones.

Q. Well, then, when you say he is 50 per cent disabled now is that that he can only do 50 per cent of a light occupation?

A. 50 per cent of the average. Because, I think he will fatigue and tire out. I think there will be days when he will have recurrence of pain due to his arthritic condition. [266]

Q. Well, due to his arthritic condition. Is it due to this accident or the arthritic condition?

(Testimony of Richard F. Berg.)

A. Well, all I can say is that he tells me he had no trouble before so I have to assume that that is truthful and as a result of this aggravation that he has had of his arthritis that he may have, occasionally, flare-ups of it in the future also.

Q. Well, there are many light occupations that he should be able to do 100 per cent, aren't there?

A. For a time, yes.

Q. Well, you mean until his back starts aching?

A. That's right.

Q. You said that he was a cooperative patient?

A. Very.

Q. Because of the fact that he did what you suggested that he do?

A. Well, not only that but I think he was trying to help himself. He has made steady progress.

Q. Well, of course, you did say that he did the things that you suggested that he do?

A. He probably did more too.

Q. Well, you know we are trying to find out what you know, Doctor, not what might have happened. Now, you didn't actually check whether he did any of the things that *he* suggested that he do, did you?

A. No, sir, of course not. I don't live anywheres near him so I don't know whether he did.

Q. So, therefore, when it comes to cooperation and you say that he did the things you suggested that he do you took his word for it?

A. Well, only his home situation. The rehabilitation center sent me reports on him occasionally that he was doing well there.

(Testimony of Richard F. Berg.)

Q. Yes. Now, what did you suggest that he do, Doctor?

A. Well, I told him he ought to carry out bending exercises, he ought to do all the light chores which he could possibly do around home that would not consist of heavy lifting but would help him regain his strength and keep his muscles in tone.

Q. Well, by the way, what is his muscle tone according to your last examination?

A. His muscle tone is pretty good.

Q. Indicates that he is using his arms?

A. Well, he has a very good range of motion now in his arm which, as I stated to you previously, was quite complicated when I saw it.

Q. But, the muscle tone in his arm——

A. Muscle tone has improved considerably.

Q. Well, since we don't know exactly what it was before we don't know what it is when you say it is improved. How [268] does it compare to the average man of his age?

A. Well, I think it compares fairly favorably with the average man of his age now.

Q. And, it would indicate that he was using his arms on some kinds of work?

A. Yes, I hope he has been.

Q. What about his legs?

A. Well, the walking takes care of that.

Q. The walking or climbing stairs? A. Yes.

Q. At any rate, his leg muscles don't appear to be atrophied, do they? A. No, I don't think so.

Q. And, their tone is good?

(Testimony of Richard F. Berg.)

A. Yes; quite good.

Q. Now, when you say no heavy lifting, what weights are you thinking of?

A. Well, I am thinking of weights from 50 pounds, 75 pounds, up.

Q. Oh. But, for carrying a bucket of water weighing from twenty to thirty, forty pounds that is perfectly all right, is it? A. Yes. Short time.

Q. Would he be able to do this work in connection with the maintenance of a considerable flock of chickens, feeding [269] them, watering them, cleaning out the hen houses, picking up the eggs, work of that sort?

A. I would think so. I should think so.

Q. What do you think, is he capable of doing the maintenance work around houses, for example, painting and the plumbing, repair and adjustments, other work that you have to do in the maintenance of houses?

A. Well, of course, painting is hard work. I don't know whether he can do that or not.

Q. Well——

A. Minor plumbing, I think he could do, sure.

Q. Just using a brush and running it over the boards would be——

A. That is very hard work if you have ever tried it.

Q. I have done much of it, Doctor.

A. So have I and it is hard work.

Q. So, I know what it is. This spine that you

(Testimony of Richard F. Berg.)

were using there to illustrate things, is that normal size for a man of his age, of his size?

A. Oh, I don't know what size this one is. It's about—well, it is a little short. I don't know what the age is in mine so I don't know much about it.

Q. Well, those aren't real vertebrae?

A. Oh, yes. These are real.

Q. Those are real? But you don't know how old? Oh, I [270] thought it was stated here it was a cast of some sort?

A. Oh, it's a real vertebrae.

Q. All right. Well, are his vertebrae larger than those? A. Yes.

Q. Now, from any of your X-rays could you tell how long before the time you took your X-rays, approximately, that the injury to his vertebrae was occasioned? A. No, I don't think so.

Q. That is, on the X-rays that you took you would not be able to tell from the appearance of those X-rays whether those fractures occurred two years before or four years before?

A. No, I don't think so.

Q. Nor even longer than that, I might say, a period of ten, fifteen years ago?

A. Well, as I say, I don't know. They just occur, that's all. But, you have ample proof of it there in your own X-rays.

Q. Well, you found one X-ray where you said that that showed a new fracture on one vertebrae, is that correct?

(Testimony of Richard F. Berg.)

A. That was—yes. That was very clear on that one.

Q. Yes. Well, did you find another one?

A. No. Because, the pictures were not good enough so I could see through them sideways.

Q. Well, of course, as far as these X-rays that are in [271] evidence here are concerned at any rate there is only one that shows one vertebra with a recent fracture, is that a correct statement?

A. That I could see as a recent fracture, yes.

Q. And how recent did that indicate to you that it had occurred?

A. While it was still in the fresh stage. So it couldn't have been too far back.

Q. Well, can you give us any estimate as to months or weeks?

A. Oh, in the past few months, yes.

Q. It would be in the past few months?

A. Yes.

Q. That was an X-ray taken about June or July of 1952?

A. Correct.

Q. Now, from your examination of your X-rays taken about—well, a little over two years after this accident occurred, is there anything in the X-rays that indicates that some of those fractures were earlier than two years and three or four months prior to that?

A. No.

Q. Of course, the healing on those vertebrae in your X-rays is complete, isn't it?

A. Well, yes, it is complete as we see them.

Q. There are no rough edges of any sort ap-

(Testimony of Richard F. Berg.)

pearing that [272] might have been due to their being fractured or compressed?

A. Well, there are rough edges but they are healed edges.

Q. Any fractures that existed there have been healed?

A. That's right.

Q. You had made an estimate, Doctor, hadn't you, as to what the extent of disability was on account of the injury to his shoulder?

A. Shoulder and back.

Q. Well, didn't you take them separately?

A. No. I took them both into consideration.

Q. On this last X-ray that you gave us here?

A. Yes.

Q. Yes. But, didn't you, in one of your reports, estimate them separately?

A. I don't remember whether I did or not. But, checking him the last time, taking into consideration the disability he has in his shoulder and in his back, it was my humble opinion that he had approximately 50 per cent of non-specified disability.

Q. Is that 50 per cent approximately equivalent of the loss of use of one arm?

A. I don't know how they figure it in the U. S. Public Health Department.

Q. Well, so that we might get some idea as to what you have in mind, when you say a 50 per cent disability would [273] you ordinarily rate a man with the loss of use of one arm as being about 50 per cent disabled?

(Testimony of Richard F. Berg.)

A. Well, that would depend, of course. You would have to take into consideration not only the loss of his arm but his occupation. If he was a professional violinist and he lost the right arm, why, as far as he was concerned it would be a very heavy loss. But, if he was a man who was a left-handed operator for some mechanical device it wouldn't be as great. In the State, of course, State Accident Commission, their specified disabilities are fairly clear. Those in the back, however, are hard to classify because we have no definite way of pinning them down other than by an arm or a leg, comparing them.

So, in this case I didn't specify arm or leg but I said in a general way a 50 per cent of what the average individual of his age would be able to carry out.

Q. Well, I had that in mind that under the compensation act if there is an injury to a back the doctors ordinarily rate it in comparing it to the loss of an arm or the loss of a leg. A. Yes.

Q. And, if by your giving him a rating of just a 50 per cent disability, does that in general mean that he would be able to do about half of the work that would be required of an ordinary working man?

A. That's exactly what I tried to imply.

Q. That he would either be able to do the full work half of the time or half—

A. Not half of the work all of the time.

Q. —or half of the variety of the work all the time? A. That's right.

(Testimony of Richard F. Berg.)

Q. Is that curve on that spine that you had there while you were illustrating your testimony—is not the natural curve, is it?

A. No. There is another curve too. Insofar as the dorsal spine is concerned it's about the normal curve. But, there is an opposite curve in the lumbar spine.

Q. And, actually, though, if you had as much of a curvature *is* they showed in that it would indicate a considerable stoop-shouldered condition, wouldn't it?

A. No. I think that is about the average curve for the straight individual.

Mr. Krause: I think that's all.

The Court: Redirect?

Mr. Williams: I have just a couple of short questions.

Redirect Examination

Q. (By Mr. Williams): When Mr. Farley visited you did he make complaints about other areas than his back or his right shoulder; that is to say, did he complain about any pain in his knees or [275] his ankles or his feet, or anything like that?

A. Well, from time to time he had generalized arthritic pains in his extremities also which, in my opinion, are on the basis of his arthritis.

Q. Would they in turn be due to the aggravation caused by the injury?

A. Oh, I didn't attribute them to that. I thought

(Testimony of Richard F. Berg.)

it was a normal consequence of the arthritic situation that he had.

Q. The small ones in the extremities?

A. That's right.

Q. Did he complain about a great deal of pain other than in his back or shoulder?

A. No. His class of complaints were in his back and shoulder.

Q. Will that pain continue, in your opinion?

A. As I stated previously, I think this gentleman will have pain from time to time in his back.

Q. You would expect that through the rest of his life? A. I think so.

Mr. Williams: I have no further questions.

The Court: Doctor, do you have an opinion as to whether or not the Libelant, in his physical condition as a result of the injuries received, has become stationary now?

A. Well, your Honor, insofar as I am able to tell I think he has, as I stated, reached maximum improvement from his [276] injury. Now, his physical condition is another situation.

The Court: Perhaps I used the wrong word because you answered what I had in mind.

The Witness: The arthritis, as I say, will flare up from time to time.

The Court: Yes, I understand.

Q. Now, when do you think, based upon your examination, your X-rays, and the evidence that you have testified to here—now, if you have any other information I want you to tell us—but based

(Testimony of Richard F. Berg.)

upon what you have testified to here and shown us in your X-rays, do you have an opinion as to whether, during the period of time either prior to the time you saw him or during the time that you have seen him, did he reach this maximum cure?

A. Well, I think he reached it just recently because it was only recently he has developed the good range of motion in his shoulder and in his back. This man can now almost touch the floor by bending which is due to the fact that he tries hard himself to do it.

The Court: I realize it may be difficult but do you have an opinion?

The Witness: The last three months.

The Court: Any further questions?

Mr. Krause: We have none.

Mr. Williams: No further questions. [277]

The Court: Very well. Thank you, Doctor.

Mr. Williams: I don't think Exhibit 2 has been introduced, your Honor, in its entirety.

The Court: My notes do not disclose any doctors' office records.

Mr. Krause: Well, we are going to have Dr. Cohen here and I don't know that that written report of his could be introduced.

The Court: It certainly would be hearsay unless——

Mr. Williams: I don't want to introduce it at this time, your Honor.

The Court: Very well.

Mr. Williams: I wish to offer in evidence Ex-

hibit Number 3, report of William J. Accurso, of the United States Coast Guard, dated August 21, 1952.

The Court: What is the Defendant's position about that, Mr. Krause?

Mr. Krause: Captain Accurso's deposition was taken and I don't recall this having been shown to him at the time of the taking of his deposition. I assume if counsel wishes to use it he could use it for the purpose of impeachment, but since his testimony was taken I think it was obligatory upon them to show it to him.

Mr. Williams: Mr. Krause, it has already been—the identification of this has already been made. There is no [278] question about its identity, is there? It has a certification on it from the Coast Guard.

Mr. Krause: I don't question its identity but I don't know upon what theory it is admissible in evidence as primary evidence.

The Court: You contend it is a part of the business records?

Mr. Williams: Well, your Honor——

The Court: You understand what I mean, the uniform——

Mr. Williams: Yes.

The Court: Otherwise, it just occurs to the Court without looking at it that it is purely hearsay. Now, if you have something clearer about it I would be pleased to hear you.

Mr. Williams: Well, it is the Captain's report

itself. I will withhold that, your Honor, until the deposition is introduced.

The Court: Very well.

Mr. Williams: Now, I will offer in evidence the deposition of Malcomb Edward Potts. I have no desire to read it unless the Court desires it to be read. I assume the Court will have an opportunity to look it over. And, if counsel wishes to make any objection to portions of it, of course, he can do so.

The Court: Well, I will be pleased to hear from counsel [279] if I am in error about the matter but I have always taken the position before that deposition as such was not in evidence. The deposition may be marked for identification so it becomes a part of the general record for identification but it is a matter of the reading of the deposition into evidence so that the trier of the facts will hear the testimony rather than have it before him in written form. Otherwise, it tends to give extra weight as opposed to the testimony of a deponent who appears in open court and gives testimony. Now, I will be pleased to hear what your theory is about it.

Mr. Williams: Your Honor, I have no preference about that. Mr. Krause, I am sure, has numerous depositions. These cases are often tried with many depositions because of the fact that the thing moved around.

The Court: I can understand that. Counsel might stipulate that instead of burdening the record, stipulate that the Court may read it.

Mr. Williams: Either way would be all right. I would appreciate counsel's remarks on it.

Mr. Krause: Well, your Honor, the practice has developed in this court of some of the judges refusing to permit the reading of the depositions in evidence.

The Court: They go to the jury as part——

Mr. Krause: Well, no, not in jury cases. But, in [280] admiralty and equity cases.

The Court: I see.

Mr. Krause: And, the judges say that they will take them and read them. Now, it does seem to me that particularly in a case of this sort—and as far as I am concerned it is agreeable to me to consider these depositions received in evidence. Now, there are these objections on the ground of materiality and relevancy which were reserved. They are not even made in the deposition, don't have to be.

The Court: Of course, as far as the admiralty courts are concerned, you have to assume that they disregard hearsay.

Mr. Krause: We will assume that the Judge would disregard those matters. So, I am prepared to stipulate that the depositions that either party wishes to have considered be read in evidence here.

The Court: Well, let's mark them for identification, then, and then we will read it into the record.

Mr. Williams: They are all marked as exhibits.

The Court: Very well.

Mr. Williams: Do you wish them read into the record, your Honor?

The Court: No, I know of no reason for burdening the record. But, I will invite counsel to do this,

that if you have some particular parts of the deposition that you want [281] the Court's attention called to I will entertain your calling my attention to the pages.

Mr. Williams: All right. Would you wish us to do that at the time it is introduced or upon final argument or what, sir?

The Court: Whatever you desire about it. If you want to present a memorandum you may do so or if you want to wait and present it to the Court orally you may do so.

Mr. Williams: I think in order to get the witnesses on we will just dispense with that for the moment.

The Court: All right. Fine. But, I will invite you to do that if you care to. Because, I can understand that each one of you would have your respective theories to the importance of the testimony of any deponent.

Mr. Williams: We will also offer into evidence the deposition of Ray H. Robinson.

The Court: It will be taken by the Court under the stipulation.

Mr. Williams: I will offer into evidence Exhibit Number 4, Notice of Claim, dated March 25, 1954.

Mr. Krause: No objection.

The Court: It will be received.

(Whereupon Libelant's Exhibit 4 for identification, Notice of Claim, dated March 25, 1954, was thereupon received in evidence.) [282]

[See page 455.]

Mr. Williams: I will offer into evidence Exhibit

Number 8, letter of David R. Williams to Krause, Lindsay and Evans, Attorneys at Law, dated April 3, 1954.

The Court: Any objection?

Mr. Krause: Well, not as to the fact that it was written to us and that this is a copy of it. But, as we see it we object to it on the ground that it has no bearing on the case at all. The statute provides for the method under which the United States—and the fact that our office was given sixty days to enter an appearance to this libel I don't think has any bearing on the case one way or the other. So, I object that it is immaterial.

Mr. Williams: Your Honor, it pertains only to the jurisdictional point which was raised by Mr. Krause and we wish to preserve our rights. The exhibit should be in in the event of an appeal or anything like that.

The Court: All right. I will sustain the objection to it but it will be received as your offer.

Mr. Williams: Well, your Honor, I don't understand the objection. It is my understanding of the ruling of Judge McCulloch that the matter did have a bearing on——

The Court: The fact that you wrote a letter to counsel who wasn't a party to it or didn't—if you want to offer evidence as to counsel's reaction to the letter, whether he called you up and said "O.K." or whatever it is, that [283] would be true. But, it is just a self-serving letter.

Mr. Williams: Well, it is involved in another case involving a jurisdictional point, your Honor.

The Court: Well, it will be in the record as your offer of proof.

Mr. Williams: Very well, your Honor.

[See page 458.]

I offer into evidence Exhibit Number 12, United States Coast Guard Rules and Regulations for Cargo, Miscellaneous Vessels.

The Court: I beg your pardon, I didn't catch that.

Mr. Williams: That is Exhibit Number 12, your Honor.

The Court: Thank you. I have it now. Any objection?

Mr. Krause: Well, your Honor, I would like to know, it is quite a book. I would like to know what rules are being offered in evidence and their pertinency to the issues.

The Court: Are you in a position to advise counsel?

Mr. Williams: Yes. If you will hand it to me. I think it is Rule 97.27-1-A.

The Court: 97.2—

Mr. Williams: 27, your Honor, -1 sub A.

The Court: Sub A. Thank you. Page 69.

Mr. Williams: And, the following section, 97.27-5, sub A.

Would you like to see it, Mr. Krause?

Mr. Krause: Well, I will offer an objection to it, [284] your Honor, on the grounds that they have nothing to do with the vessel at anchor. Those are the rules for navigation and have nothing to do with this case of a vessel anchored, and they don't have

any bearing upon the issues of this case in any event.

Mr. Williams: Your Honor should perhaps see them.

The Court: Yes. Will you please let me have them and then I will hear from you whatever your claim for it is.

Mr. Williams: We don't feel that they are limited to vessels under way at all. It doesn't say anything about under way. I feel it covers all vessels at anchor or otherwise.

The Court: "All ocean and coast-wise vessels shall have a lookout at all times at or near the bow during the nighttime." Now, it is your position that that is effective when a ship is at anchor in a harbor?

Mr. Williams: Yes. The words "at all times," I feel means what it says and I can find no other language which is limited to ships under way. I have just read through those matters, generally, and I don't find—I don't know reasons why it doesn't. I didn't get the impression—it never occurred to me until Mr. Krause made the objection.

The Court: What would be the proximate cause of having a lookout at or near the bow in this connection?

Mr. Williams: Very definitely this, your Honor: He [285] could have observed the existence of the liberty boat and could have also—could have, therefore, been at the rail to assist the liberty party coming aboard and to supervise them coming aboard.

The Court: The testimony is that that is the deck officer's obligation.

Mr. Williams: Well, a lookout could inform the deck officer. That would be the purpose of it. The deck officer could not be every place in the ship at once and that would be why he would be there, be informed as to all activity.

The Court: Would you maintain that when a ship was moored to a dock that you would have to have a lookout on the bow?

Mr. Williams: You would have to have a lookout on the dock.

The Court: At or near the bow?

Mr. Williams: Yes.

The Court: Well, I guess——

Mr. Williams: I don't feel that I am required to maintain it, your Honor. The Coast Guard does.

The Court: Well, I understand that. But, I am not at this moment going to take the time to read this whole book to ascertain when these rules apply. And, I am going to have to rely on the statements of counsel at the moment. But, I am just amazed that that would be a rule. [286]

Mr. Williams: Your Honor has heard testimony to the effect that it is quite customary to have a gangplank watch out, anything of that nature, particularly at the dock to prevent improper boarding, unauthorized personnel, improper cargo, and things of that nature. Whether that lookout would comply with being at or near the bow, I don't know. It would depend on where the gangplank went down. If the Court wishes to reserve ruling on it till a

later date I am not going to offer any testimony at this time in connection with it.

The Court: There is nothing in this sub-part "shall exonerate any master or officer in command from the consequences of any negligence to keep a proper lookout or to maintain a proper fire watch or for any negligence in any precaution that would be required for the ordinary practice of seamen or by the special circumstances of the case. When circumstances require it additional watch shall be maintained to guard against fire or other dangers and to give an alarm in case of action under the statute." It seems to me that that is nothing more than just an ordinary due caution.

Mr. Williams: I think it merely states that all the regulations pertaining to what is good seamanship or good care are not contained in the book.

The Court: Well, until I am better advised I will reserve my ruling on it.

Mr. Williams: Very well, your Honor. [287]

The Court: Now, my notes do not disclose the admission or receipt of Exhibit 9, the medical bills of libelant.

Mr. Williams: Oh. I think they are all in, are they not? I believe they are all in and Mr. Krause stipulated that the persons would testify that those were reasonable if they were called.

The Court: Yes. But, you recall the Court ruled there was no testimony as to reasonable necessity of all of them.

Mr. Williams: I am sorry. I will offer them at this time, your Honor.

Mr. Krause: Well, I will withdraw any objection on that ground, your Honor. I think the testimony of the Doctor discloses their necessity.

The Court: Very well. They will be received.

(Whereupon medical bills of libelant previously marked as Exhibit Number 9 for identification were thereupon received in evidence.)

Mr. Williams: I believe all our listed exhibits are now in, your Honor, with the exception of Number 3 and Number 8 which the Court has.

The Court: Number 12?

Mr. Williams: Number 12 is under advisement. Number 8, as I understand, the Court—

The Court: Sustained. That is what my records show. [288]

Is that your case?

Mr. Williams: Yes, that is our case, your Honor.

The Court: Well, Mr. Krause, it is only four or five minutes before 5:00. Is there any reason why we can't start at 9:30 in the morning?

Mr. Krause: We can, your Honor.

The Court: All right. 9:30 tomorrow morning.

(Whereupon the Court adjourned for the day, July 28, 1955.) [289]

Morning Session

(Court reconvened at 9:30. July 29, 1955, pursuant to recess.)

The Court: Defendant's first witness.

Mr. Krause: We will call Captain Hazelwood.

JAMES A. HAZELWOOD

produced as a witness on behalf of the respondent, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Krause): Your name is James A. Hazelwood? A. Yes, sir.

Q. What is your profession or occupation?

A. I am a marine superintendent for Luckenbach Steamship Company.

Q. Your profession generally is that of a seaman? A. Yes, sir.

Q. When did you start going to sea?

A. Well, I was raised on the water. I started quite early. I started to go to sea on outside ships about 1913.

Q. What sort of a license do you hold?

A. I hold a master's unlimited license and several pilot's.

Q. How long have you held your master's license unlimited? A. Since 1923. [290]

Q. How long did you sail under that master's license?

A. I sailed as master about twelve years.

Q. Now, at the present time you are a marine superintendent for the Luckenbach Steamship Company here in Portland? A. Yes.

Q. What are your duties with respect to ships?

A. Well, my duties is the operating part of the ships, see? Cruise ships and operating of the ships in general and also I run the stevedore company.

(Testimony of James A. Hazelwood.)

Q. Are you familiar with the duties of the various licensed officers on board merchant vessels, Captain? A. I am.

Q. Particularly with the duties of second assistant engineers? A. Yes.

Q. Now, what are the duties of second assistant engineer outside if there are any outside of his immediate work in the engine room?

A. Well, the second assistant, as far as his duties is concerned, outside of the engine room he don't have any. But, I think it is the duty of any officer of the ship including the second assistant engineer if he sees anyone or any part of—any danger to anyone on the ship, the ship itself, he certainly should interfere and try to correct it.

Q. Well, who are these people on the vessel that carry out the owner's obligations when the vessel is away from under [291] the control of the owner?

A. Well, the licensed personnel on the ship.

Q. Now, these licenses, who are they issued by?

A. They are issued by the department of—well, not the—it is the Coast Guard now. It used to be the Department of Commerce. Now it is the Coast Guard. U. S. Coast Guard.

Q. Are there examinations given before the licenses are issued? A. Yes.

Q. Do those examinations—what is the purpose of the examination?

A. Well, it is to arrive at the ability of a man to perform the duties in which he is applying the examination for.

(Testimony of James A. Hazelwood.)

Q. Then, these licenses are issued for periods of how long? A. Five years.

Q. Five years?

A. Well, if he has—goes and gets his license. But, the period that he sails on that particular license for is five years. But, he can get the raise of grade during that time if he has served his time under that license in that capacity or the capacity of a lower grade with a higher license.

Q. Yes. So, after a person has his second assistant's license he can, after sailing under that license during that five-year period, come up for his next license?

A. Well, he don't have to sail five years. I think he [292] sails one year on that and two years as third assistant. That is to the best of my judgment.

Q. Well, that is enough service. But, he has to take an examination for the next rate?

A. Yes. That's right.

Q. Does the second assistant engineer stand a watch in the engine room when there is no other engineer officer there at the time?

A. That's right.

Q. That is, does the second assistant engineer have complete charge of the engine room during the time that he is on watch?

A. Four hours and then he has eight off.

Q. Now, Captain, what duty, if any, does the second assistant engineer have if he sees a member of the crew not on his watch or not even in his department doing something that he knows is hazard-

(Testimony of James A. Hazelwood.)

ous and likely to produce injury to himself or to others?

A. Well, I certainly think it is his duty as an officer of the ship—as an officer of the ship and also a humane act to tell the man that he is doing something that he shouldn't do, to keep him out of trouble, or keep some of the other crew members out of trouble.

Q. Well, we are concerned particularly with whether there is a duty. While anyone has some moral obligations toward others, we are concerned here with whether or not licensed [293] officers have a duty under those circumstances.

A. Well, they do have a duty. And, I see it happen on our ships quite often that men that are not directly connected with that department will warn people or tell people not to do things in which they shouldn't do.

Q. By the way, I would like to have you just explain generally what a pilot ladder or Jacob's ladder is?

A. Well, we usually call a pilot ladder or ladder, that is, these—something like that (demonstrating) the size of it with a rope around it and they have sometimes a solid foothold and sometimes a round, two rounds. That's what they call a pilot ladder. A Jacob's ladder—what we used to call a Jacob's ladder is what a sailor uses for painting over the side. It's just a rope ladder with one spindle to it and the men usually climb that by getting over one side of it so they can keep it away from the

(Testimony of James A. Hazelwood.)

side of the ship so they can get their toes between the sides of the ship. What we usually—a Jacob's ladder, the steps are wide enough so that they don't have to hold it away from the ship. They usually grab it by the sides coming up—not by the steps, but by the—on the side of the ladder because there is space enough between to get your hands between the side of the ladder and the side of the ship.

Q. Well, the description of this ladder apparently is of the ladder type? [294]

A. That's right.

Q. That is, it had oblong pieces on the end?

A. Yes. And, they are gouged out where the rope fits into these pieces.

Q. Yes. The edges are gouged out and the rope lays—— A. Right.

Q. ——in the gouge? A. That's right.

Q. Then, are they seized up at the top and at the bottom of each one of these?

A. They are seized in between the steps so it will hang on. The rope will stay in that way.

Q. This one was described as having two regular rounds. A. That's the usual.

Q. That is the usual type?

A. That's the usual pilot ladder, yes.

Q. Now, if that is in good condition, Captain, is that a safe method for crew members to board and leave the ship? A. Well, it's at anchor?

Mr. Williams: I object to that, Your Honor. My objection is that our contention is that we do not contend that it is not safe at all but it is unsafe

(Testimony of James A. Hazelwood.)

under the particular circumstances herein contained, the night, the light, the fact that there was no watch above, and the further fact that it is the entire crew returning from shore liberty. [295]

The Court: Yes. I think the witness is entitled to have the entire factual situation just as the respondent asked of libelant under the conditions.

Mr. Krause: Yes, Your Honor.

Q. Captain, assuming that this vessel was lying at anchor in the harbor of Sasebo, Japan, are you acquainted with that harbor? A. Yes.

Q. And, it was a liberty ship— A. Yes.

Q. —this ship was at the time discharging piling and bridge timbers with Japanese Longshoremen from the deck into the water; the occurrence was at about 12:40—between 12:40 and 1:00 A.M. in the month of April; there were two floodlights attached to the boat deck that were trained down onto the ladder, and the steps of the ladder were clearly visible when persons were walking or climbing; a portion of the crew of the vessel including the second assistant engineer had been ashore, having gone ashore in a launch furnished by the vessel's owner, and returned after midnight; and it was estimated that there were from ten to fifteen members of the crew on the launch; the launch was 25 to 30 feet in length and from six to seven to twelve feet in breadth or beam. Now, Captain, under those circumstances what can you tell us as to whether or not a Jacob's ladder of the kind described here is safe?

Mr. Williams: I have an objection, Your Honor.

(Testimony of James A. Hazelwood.)

Counsel states it was an assumed fact that the ship was discharging cargo. The log shows clearly that it was not at the time of the injury and there has been no testimony to indicate that any cargo was being discharged at that time. The log shows that it had been finished well prior to the——

The Court: Counsel can assume any facts he desires in his hypothetical.

Mr. Williams: It is my understanding, Your Honor, that they have to be facts that are in evidence.

The Court: Well, it all depends which comes first the horse or the cart. In order to make his hypothetical be of any weight he has to supply those facts. But, he may start out with any assumption he desires.

Mr. Krause: May I have the log, please?

The Court: Yes, you may.

Mr. Krause: Your Honor, the log indicates that the discharging was completed about 10:30. Well, there is testimony in some of the depositions that they were discharging. And, I am going to eliminate that, however, and rely upon the log for accuracy.

The Court: Very well.

Q. (By Mr. Krause): Captain, just disregard the fact that any discharging was being done at the time and that discharging had been completed about 10:30 that night. Now, what [297] can you tell us as to the safety of the use of such a Jacob's ladder as has been described here for the members of the crew to board the vessel?

(Testimony of James A. Hazelwood.)

A. Well, I think it is immaterial whether the cargo is being unloaded or not because pilot ladders are being used continuously by boarding crews and other people coming aboard the ships. And, I have never heard any question about the safety of using a pilot ladder if the ship is at anchor for the ship's crew.

Mr. Williams: I move that that portion of the witness' answer covering what he has heard——

The Witness: Well, what I have seen.

The Court: Just a moment. There is a great deal of expert testimony that is based upon hearsay. That is the only way experts get their information is by reading books and studying. Well, that doesn't develop an objection.

Mr. Williams: Can he offer testimony, Your Honor, what he has heard from somebody sometime or some place?

The Court: That is the whole basis of an expert. How does an expert obtain knowledge except through hearsay?

Mr. Williams: We assume he obtains some from experience.

The Court: That is the big distinction. But, I will hear you on any other grounds.

Mr. Williams: Well, I further move to strike his answer [298] as not being responsive to the question.

The Court: Well, now, very well.

(Last question and answer read by the Court Reporter.)

(Testimony of James A. Hazelwood.)

The Court: All right. I will leave the answer in.

Q. (By Mr. Krause): Now, Captain, what is your own opinion then as to the safety of this pilot ladder for that purpose?

A. Well, I think the pilot ladder is certainly safe because we are using it every day in such manners.

Q. Now, for how many years have you, being in charge of vessels yourself, used and seen these pilot ladders such as the one described used?

A. Well, I have seen them continuously. All of my time and experience with ships I have seen this type of ladder. It's been improved a lot, it is better now than it was a few years ago, but this type of ladder has been used to my knowledge ever since I have had anything to do with ships.

Q. Now, what equipment on the vessels is used regularly for the purpose of putting men over the side to staging while painting?

A. Well, it's usually not as good a ladder as this pilot ladder. They use what we call a Jacob's ladder.

Q. And that is the type you have described before? A. That's right.

Q. Just the ropes with a round put in between?

A. That's right.

Q. Now, what sort of ladder is used by the pilots and health inspection officers and the immigration officers when vessels are coming off a foreign voyage?

A. Well, in all American ports, to my knowledge, they use this pilot ladder. Now, the only place

(Testimony of James A. Hazelwood.)

I know that don't use them is some of the Central American ports and not—that is not because it's unsafe, it is because they come aboard dressed up in white uniforms with everything on them and they require a little bit of better attention to climb aboard in order not to get their white uniforms dirty.

Q. Now, when vessels are in the Portland harbor and in other harbors where the water is quiet, what method is used for getting down onto barges and log rafts and so on?

A. We use the pilot—the regular pilot ladder.

Q. And, are those pilot ladders in continuous use daily here in the port of Portland?

A. They are.

Q. Are they used in the nighttime for the same purpose? A. Yes.

Q. Now, Captain, can you tell us whether there is any danger in a man climbing a pilot ladder of the kind described here when he has his hands encumbered and, particularly, by carrying a bottle of whisky under the left arm and holding one in his right hand by the neck and attempting to [300] climb the ladder in that fashion?

A. Well, he certainly does endanger himself and anyone that is anywhere in his vicinity by doing such an act. It's an unsafe act all the way.

Q. Are there any, based upon your years of experience on a vessel, rules regarding standing under loads, standing under ladders, while men are ascending them aboard American merchant ships?

(Testimony of James A. Hazelwood.)

A. Well, I don't know as there is any rule but it certainly is a practice that people don't stand under ladders when other people are climbing them with packages—particular packages in their hand.

Q. In connection with the loading of cargo, for example, and bringing in of loads, what is the practice with regard to standing under them?

A. Well, the men are not supposed to and they don't, to my knowledge. The winch driver in taking the loads, he sings out to the men to stand clear and they usually stand clear. And, no one is supposed to be on a ladder going up or down the hatch when there is a load swinging over the hatch. That is a standing rule all along the water front.

Q. Are there other straight-up-and-down ladders on the ordinary liberty ship other than the pilot ladder that may be thrown over the side?

A. Yes. All the hatches have up-and-down ladders and [301] the men climb the masts, there is up-and-down ladders there for them to use. And, on this liberty ship from the forward end of the house it also has an up-and-down ladder that you go up from the main deck to the boat deck.

Q. Those straight-up-and-down ladders are constructed of what and how?

A. Well, they're steel. Steel ladders.

Q. Steel side pieces?

A. Yes; and steel rungs.

Q. And steel rungs? A. Yes.

Q. Is there more than one rung in those ladders?

(Testimony of James A. Hazelwood.)

A. Oh, no. There are several rungs. I think the rungs are about a foot apart.

Q. I mean, for each step?

A. Some of them have more than one but lots of them have only one rung. The ladders going down the hatches all have one rung.

Q. Are the ladders straight up and down in the engine room of the liberty vessels?

A. Well, they are not exactly straight up and down but it's a small angle. But, usually they go down sideways. Or, some people—I don't go down sideways but a lot of people go down backwards when they go down a ladder. But, there are two: some of them are separate and some of them have two pieces for the ladders. [302] Have two pieces for the ladders.

Q. Some have solid steps and some have two rungs? A. Yes.

Mr. Krause: You may cross-examine.

Cross Examination

Q. (By Mr. Williams): Captain, you are the marine superintendent for Luckenbach Steamship here in Portland now? A. Yes.

Q. Your job is a supervisory one. Are you still taking ships out? A. No.

Q. You aren't doing that? A. No.

Q. How long has it been since you took your last ship out? A. Oh, about seven years.

Q. When a master and a crew sign shipping articles who signs as representative of the owner?

(Testimony of James A. Hazelwood.)

A. Well, I don't know as there is any rule but it certainly is a practice that people don't stand under ladders when other people are climbing them with packages—particular packages in their hand.

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(Testimony of James A. Hazelwood.)

A. All members of the crew sign Articles on the space preserved for them and the Master signs the Articles as a representative of the ship owner.

Q. Actually, the Articles are a contract between the captain representing the ship and the men as employees? A. That's right.

Q. Captain, you say you are using the Jacob's ladder [303] every day? A. That's right.

Q. You mean for longshoremen getting down to barges and various things like that?

A. Longshoremen, sailors, whoever have to go over the side. I use it myself. I climb up and down it myself.

Q. This is during regular duty hours?

A. Yes. Well, our duty hours are 24 hours a day, you know, so it don't mean whether it's day or night, we still climb the ladder.

Q. I realize that, Captain. You were performing functions aboard the ship?

A. That's right.

Q. Are these ships that are being unloaded, most of them are alongside docks, aren't they?

A. That's right.

Q. There is a regular gangway there provided for persons to walk right onto the deck of the ship?

A. That's right.

Q. And sailors going on shore liberty would use the gangway, would they not?

A. They would use the gangway.

Q. And, immigration officials, pilots, doctors, people of that category that you have spoke of often

(Testimony of James A. Hazelwood.)

coming aboard on the Jacob's ladder, they are on business, are they not? [304]

A. That's right.

Q. And, they're usually not doing any drinking or anything like that when they're coming aboard, are they?

A. No, they're not. And, the law is very specific in the rules of—that the men shall not bring whisky on board the ship or come aboard the ship under the influence of liquor.

Q. Captain, do you recall whether it says what you say it says or whether it simply requires that grog shall not be brought aboard?

A. Well, you can use whatever word you want, it means the same thing.

Q. But, the individuals you speak of that are using the Jacob's ladder every day, they're using it for regular duty functions of the ship or going aboard the ship for various specific purposes, aren't they?

A. Well, I said that the crew uses it for the same use it was being used at this time. Certainly, people that use it, they wouldn't be climbing up the Jacob's ladder to get aboard the ship unless they were members of the crew of the ship or they had some business there. They wouldn't just use that for a form of exercise.

Q. What I am getting at, you're not testifying that Jacob ladders are being used in this harbor for a crew to go ashore, or anything like that, are you?

A. Well, when the ship anchors — and, some-

(Testimony of James A. Hazelwood.)

times I do anchor down off of Swan Island there—and there is a Jacob's ladder used for the men to go to and from the ship.

Q. What ship?

A. Whenever a ship is laying at anchor in this harbor, to my knowledge, they—the crew goes ashore on the Jacob's ladder.

Q. They don't use the accommodation ladder?

A. Very seldom. When a ship is laying in the harbor they don't use the accommodation ladder.

Q. They don't use it at all?

A. That's right.

Q. What is it used for?

A. Well, an accommodation ladder is a very dangerous device when laying in a harbor or laying in the harbor because these small boats get caught under it.

Q. What about a harbor where the water is smooth?

A. Also I would rather use any time—and most ships would rather use—a pilot ladder than they would an accommodation ladder because you have got that platform at the bottom and the men have to step—they—if the ladder is down for enough so they can come around, the men have got to step around this ladder or step on a platform.

Q. Well, Captain, can't that platform be very easily adjusted [306] by the boat personnel from up above to regulate it at any convenient height for the boat?

A. Then they would either have to step down or

(Testimony of James A. Hazelwood.)

step up if you put it lower or raised it. Now, using a pilot's ladder coming aboard the ship it's a rule, and a safe rule that somebody get over the ladder and pull it on board the boat so as it's not down between the side of the ship and the launch that is coming alongside. That is the safe method of using a pilot ladder, is to get it aboard the small boat that's there so it don't hang down or get crushed and somebody step off on it and he go below.

Q. Well, then, somebody has to hold it onto the small boat, hold the tail of it while the other men start off?

A. No, he doesn't especially have to hold it, he can just pull it on board, see?

Q. I see.

A. But, keep clear of it. It's a standard practice to keep clear of a pilot ladder.

Q. I didn't ask you that question, Captain, but perhaps I will in a moment. But, you say it's a practice to pull this Jacob's ladder aboard the liberty launch. Then, when the first man steps on it wouldn't it fall down in between the——

A. Well, the proper way to rig this ladder which is not always done, maybe, is to be sure that the ladder don't [307] come down far enough so it's below the boat, see? But, if it is it's a rule before I get on a ladder I would be sure that that ladder was clear. And, if there was a little bit of it I'd have it on the boat so when I—when I stepped on it I—it would be clear, I wouldn't be getting hung up some way.

(Testimony of James A. Hazelwood.)

Q. A liberty launch doesn't fasten onto the ship when she is there, it just lays alongside?

A. As a rule they put a rope from the boat. They throw a line aboard the ship.

Q. Way up over the deck?

A. Up to—not always but that would be the proper procedure.

Q. Yes. Captain, you mentioned that you have seen men come aboard on Jacob's ladders. What about the packages, how do they get them aboard?

A. Well, I—I, in my experience, I have seen people climb up a ladder with packages but it's certainly not the thing to do. But, most people, when a liberty party comes alongside, the party not having packages comes up above and throws down a heaving line usually—heaving line or—he throws down a heaving line and these packages are tied onto it and brought on board by one of the members of the crew that is in the party.

Q. Wouldn't that be done by somebody that is on gangway [308] watch up above?

A. Well, not always. Not always. We have a very funny deal today, you know? You'll see some guy say, "How about getting my packages up?" And he wasn't a friendly guy, the guy up above would say, "Come up and get them up yourself." Well, it would be the friend of somebody in the liberty party that climbed up the ladder first and then he'd pass a rope down for his friend to bring his packages up.

(Testimony of James A. Hazelwood.)

Q. Captain, you are steadily employed by Luckenbach? A. Yes, sir. That's right.

Q. Right now? A. That's right.

Q. And, did you take ships for them prior to that time?

A. No. I worked for Martin-Hawaiian Steamship Company all the time for 33 years except the time out in the Service. I worked for American-Hawaiian Steamship Company and I was working for American-Luckenbach — American-Hawaiian. I still get mixed up.

Q. The ladders that go up the hatchways those are used by sailors, primarily, longshoremen?

A. Longshoremen and sailors.

Q. They're not used by stewards, are they?

A. No, not ordinarily. Maybe one of them goes down once in a while but he has got no business down there. [309]

Q. The ladders that go up the mast, they wouldn't be used by the stewards? A. No.

Q. Captain, is a Jacob's ladder a safe thing—appliance to be used by a person who is inexperienced in the use of it and who hasn't been up one before? A. I——

Q. Or is there a little trick to it?

A. No, I don't think there is any particular trick to it, if a man has got use of both hands. And, you see some men go up a ladder and some of them will go right up and some of them will hang onto it like they're in love with it, hold on with both arms. I saw longshoremen going down the hatch the

(Testimony of James A. Hazelwood.)

other day and I asked a fellow, "Is he a new man or has he been around a long time? The way he is going down that ladder I don't think he has ever done it before." And this fellow says, "He's an old timer but he is just a little nervous, that's all."

Q. If there is a dangerous point in the ladder where would you say it would be, first getting on or just as you are getting off or halfway up or——

A. Well, if there is still water there is no dangerous points. If the water is rough there is dangerous points. Because, the proper way to get on a ladder is to watch your point, when your boat comes up step then. If you get [310] on it lower down, when she comes up she will catch you. But, the proper way to get on this ladder is watch your boat. Sometimes these fellows—the very fellow you are talking about — these fellows are climbing, they're going up and down, I always instruct the men, "Now, watch it when you come up. Jump the ladder so when the boat goes down you will get clear."

Q. You generally give the stewards some sort of instructions?

A. Well, I give anybody who—whether it's a steward—if I am on a boat if I have never seen the man before I think it's only my duty if I can see that it's not a person who is accustomed, well, I will say to him "Now, here, you better watch yourself because this is dangerous procedure."

Q. You will generally give men that are new to you some instructions on that?

(Testimony of James A. Hazelwood.)

A. Well, I do.

Q. Yes. Now, Captain, what I was wondering is this: When a man climbs the ladder and the ladder goes over the rail, over the main deck rail, we will say, or some place else into the boat, when he is climbing over that rail does he have a problem then with where to put his hands and how to get off?

A. Well, as usual these ladders are made fast over a pipe rail or something where he steps on that rail before he goes [311] over the side, see? He don't just climb all the way up. When he gets up to this rail on the pipe rail or some of the bulwark he will—it's usually made fast some way. It's got to be because—some place to make it fast. Now, I don't know just how this ladder was made fast but if it was somewhere around where he could get his hands over something and climb over that is not too good a place to get over and, naturally, unless there is something to get hold of there——

Q. But, I mean, the ladder is ending and going over the rail.

A. That's right.

Q. And you were getting up, you bring your feet up but there isn't anything there for your hands, you have got to get in a crouch or something, don't you?

A. Yes.

Q. To kind of get over?

A. I don't think—I think getting on a ladder any time from a boat is just about as bad a place if it is any bad place in it as getting over the rail.

Q. Of course, in smooth water you wouldn't have the trouble then, would you?

A. No.

(Testimony of James A. Hazelwood.)

Q. Where do you normally rig a ladder on a—let's say on a liberty ship? You said you were providing for crew [312] liberty?

A. Well, as a rule the ladder or pilot ladder is used usually. Now, I don't know whether this one—it's just rigged fore of the house because that is the best place. That is the clearest place to get aboard the ship.

Q. Where is it rigged then, the main deck, you say?
A. On the main deck.

Q. That is where most of the crew would be getting on and off, isn't it?
A. That's right.

Q. But, suppose it was rigged up to the boat deck up above there and——

A. Well, that's rarely—I don't know how this—but, that's nothing wrong. The men can just go all the way up and then step off onto the house. That would be just as good a way to rig it from the boat deck.

Q. Yes?

A. Because then the men could climb all the way up, he could just climb up until he—and then step off on the main deck.

Q. Oh. Then, he would step around the edge of the ladder?

A. That's right, under it. Right under the house. He could still hang onto the ladder and then he would have a good hand hold to grab onto.

Q. What would he hang onto? [313]

A. Hang onto the ladder until he got stepped around there.

(Testimony of James A. Hazelwood.)

Q. He would have to step around it?

A. He would have to step around it all right.

Q. Suppose his hands were encumbered at that point, would that be pretty dangerous?

A. Well, he shouldn't have anything in his hands when he does it.

Q. Well, just at that point it would become extremely dangerous if the hands were encumbered?

A. Well, it certainly would be.

Q. You would instruct your men not to do that?

A. I sure would.

Q. Yes. In giving them a little instruction or training on the use of the Jacob ladder would you tell them that they should climb with both hands free, is that the correct thing——

A. Certainly do.

Q. ——to tell them?

Mr. Williams: No further questions.

Mr. Krause: I have nothing further.

The Court: Captain, it is the contention of the Libelant in this matter that the Respondent was negligent in one particular in rigging the pilot ladder to the boat deck rather than to the main deck. Now, with the information [314] that you have in the questions presented here and the testimony that you have given, what would have been the method of a seaman getting off of the ladder and getting onto the main deck if the ladder had been rigged to the main deck, the top of the bulwark, or railing, whatever it might have been there?

The Witness: Well, if it had been on the rail-

(Testimony of James A. Hazelwood.)

ing, if it—now, these liberty ships, they have—their bulwark are solid.

The Court: About four feet?

The Witness: But, if it had been rigged to the main deck it would probably have been rigged by the—at the corner of the house where he could have put his arm around it, the support, the upright, from the main deck at the bridge there, see? But, if it was rigged on the boat deck and he wanted to get off on the main deck there is nothing wrong with that. He just steps around and he puts his arm through the ladder until he gets down on deck.

The Court: Wouldn't one have been more difficult than the other?

The Witness: I don't think so.

Mr. Williams: I have just another question in line with that.

Cross Examination—(Continued)

Q. (By Mr. Williams): There are many places along the side there of the [315] house section where there are no supports to hang onto, are there not? I mean, these supports are spaced at intervals, are they not? A. That's right.

Q. It would depend on where this particular ladder was placed as to whether or not he had anything to hold onto?

A. Yes. Unless he hangs onto the ladder and went over the side. I can't imagine there not being something there, either the halyard on deck where they tie the ship up or a box or something for a man to step off the rail for him.

(Testimony of James A. Hazelwood.)

Q. I mean, for him to hold onto?

A. That's right.

Q. There wouldn't ordinarily be anything there?

A. That's right. Sure.

Q. And, if he is stepping around the side of the Jacob's ladder, it is—it's just fastened on the pipe rail of the boat deck, it would hanging free down there, would it not? A. That's right.

Q. Wouldn't it sway as he stepped around it like that—— A. No.

Q. ——and try to bring his weight off it?

A. Those ladders stay pretty close. That's the reason they are built is to hug the side of the ship. With his weight on it it shouldn't sway around. It would sway a [316] little bit, of course, but I don't think it would be particularly dangerous.

Q. But, it is your testimony that it would be very much so for a man who had his hands encumbered?

A. Well, I don't think a man should have his hands full climbing a ladder any time. I think it is danger put there that shouldn't be there when a man goes on any ladder—I wouldn't climb a ladder at home—when I climb a ladder and want something I usually climb it and let my wife stand on the bottom or pass it up to me or hook up a rope so she can pull it up when I get there. I don't climb with my hands high to start with.

Mr. Williams: Thank you very much, Captain.

The Court: You may step down.

(At this time a recess was taken in the present case and the Court heard ex parte matters.)

Mr. Krause: Respondent will call Captain Larson. [317]

HERMAN H. LARSON

produced as a witness on behalf of the Respondent, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Krause): Your name is Herman Larson? A. Yes, sir.

Q. Where do you live?

A. At 5026 Northeast 10th Avenue.

Q. What is your profession?

A. I am a ship Master.

Q. How long have you held a Master's license, Captain? A. Since 1931.

Q. How many years have you sailed as a Master of vessels? A. Since 1936.

Q. Since 1936 continuously, or up till what time? A. Continuously.

Q. Continuously?

A. Continuously up to '54. I am sort of semi-retired. I am relief Captain now.

Q. At the present time you are engaged as a relief Captain? A. That's right.

Q. Is that just to relieve some Master for short periods of time? [318]

A. Yes, sir. That's right.

Q. Have you been in the harbor of Sasebo, Japan? A. Yes, sir.